TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1333. ~~312 361~~ 284

THE MICHIGAN MUTUAL LIFE INSUANCE COMPANY,
PLAINTIFF IN ERROR,

vs.

ELIZABETH R. ADAMS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF INDIANA.

FILED JANUARY, 28, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas of the circuit court of the United States for the district of Indiana, begun and holden at the United States court-house, in the city of Indianapolis, in said district, on the first Tuesday of November, in the year of our Lord one thousand eight hundred and eighty-six, before the Honorable William A. Woods, judge of the district court of the United States for the district of Indiana and *ex-officio* judge of said circuit court.

Civil Action.

ELIZABETH B. ADAMS
vs.
THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY OF DETROIT, MICHIGAN. } No. 8122.

Be it remembered that heretofore, to wit, at the November term of said court, on the 23d day of April, 1886, before the Honorable William A. Woods, judge as aforesaid, the following proceedings were had in the above-entitled cause, to wit:

Comes now the plaintiff, by Harrison, Miller & Elam, her attorneys, and files her complaint herein in the words following, to wit:

The plaintiff, Elizabeth B. Adams, who is a citizen of the State of Indiana, complains of the defendant, The Michigan Mutual Life Insurance Company, of Detroit, Michigan, a corporation organized under the laws of the State of Michigan, having her principal office and place of business in the city of Detroit, in said State, and a citizen of said State of Michigan, and says that on or about the 16th day of February, 1877, in consideration of the sum of $339.70, then and there paid to the defendant by Kneeland T. Adams, who was then and there the husband of the plaintiff, said defend-
2 ant issued and delivered to this plaintiff its policy of insurance numbered 12711, a copy of which policy is filed herewith and made a part hereof, and marked Exhibit "A," and thereby promised and agreed to pay to this plaintiff the sum of ten thousand dollars (first, however, deducting any unpaid balance of the current year's premium, or any other indebtedness to the company on account of this policy) in sixty days after due notice and satisfactory proof of the death of the said Kneeland T. Adams, provided such death occurred on or before twelve o'clock at noon of the 16th day of February, 1878.

And plaintiff says that said policy of insurance also contained the further agreement with plaintiff that said policy might be renewed by the payment, on or before the 16th day of February in each year, of a stipulated sum or corresponding semi-annual equivalents, at the date of such renewal, in accordance with official schedule of rates for each one thousand dollars insured printed on the back of said policy, a copy of which rates is also filed herewith and made a part hereof, and marked Exhibit "B."

And the plaintiff further says that on or about the 15th day of July, 1884, the defendant issued and delivered to her the following additional agreement as a part of said policy of insurance, which she then and there accepted and adopted, to wit:

The Michigan Mutual Life Insurance Company.

Incontestable policy clause.

No. 12711. Name, K. T. Adams.

Provided that after three years from date of this policy, and the payment in cash of three years' premiums, the liability of the company shall not be disputed because the death of the assured
3 was caused by his own act or because of any misrepresentations in the application, not wilful, save that if the age of the assured is understated the company shall only be liable for such an amount as the premiums received would have paid for at the rates as charged by the company at that date for persons of the insured's real age.

O. R. LOOKER, *Secretary.*

And plaintiff says that all the premiums due on said policy of insurance were paid in full as they matured, and said policy was kept continuously in full force and effect as therein provided until the 16th day of February, 1885.

That the premium which fell due on the 16th day of February, 1885, being the sum of $259.10, was paid by the insured, Kneeland T. Adams, to the defendant, as follows: Cash in hand, the sum of $59.10; and for the balance, $200.00, said insured executed and delivered his note, payable four months after date, to the order of the defendant, and thereupon the defendant executed and delivered to the said Kneeland T. Adams a receipt for said premium, which is in the words and figures following, to wit:

The Michigan Mutual Life Insurance Company.

$259.10. DETROIT, MICH., *Feb. 16th*, 1885.

Received two hundred fifty-nine and $\frac{10}{100}$ dollars, being the annual premium due this day on policy No. 12711, continuing the same in force until 12 o'clock noon of the 16th day of February, 1886, on the life of Kneeland T. Adams, of Indianapolis, Ind.: Provided, That if any note or other obligation has been given for such premium or any part thereof and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment the company shall not be liable, but the whole amount of the premium included in such note or other obli-
4 gation shall be considered as earned, and the company may collect the same.

O. R. LOOKER, *Secretary.*

[On margin:] Renewable term policy.

[Written across the face in red ink:] Countersigned this 16th day of Febr'y, 1885.

A. BOICE, *Collector.*

This receipt must be countersigned across the face by the agent or collector.

And defendant then and there renewed and continued said policy in full force and effect until noon of February 16th, 1886.

And plaintiff further says that said note remained in the hands and possession of the agent or collector of defendant until the maturity thereof and long afterwards; that on or about the 7th day of October, 1885, the said Kneeland T. Adams paid to the defendant the sum of $110.00 in cash, which sum was then and there endorsed on the back of said note as a credit thereon by defendant's agent, and the defendant then and thereby continued said policy in full force and effect and waived any forfeiture thereof if any theretofore existed.

That said note continued and remained in the possession of the agent of defendant thereafter until the day following the death of said insured, to wit, the 18th day of December, 1885, when said agent surrendered the same to the secretary of the defendant, who took said note and now holds the same; that defendant has never at any time tendered back or offered to surrender said note to the plaintiff.

And plaintiff says that she never knew that said note was unpaid or that the receipt above set out had been given to her said husband until the proofs of death of said insured were made to defendant and payment of said policy demanded by her of the defendant, but supposed her said husband, who attended to all matters pertaining to said insurance, had fully paid all premiums on said policy.

And plaintiff says that her said husband, Kneeland T. Adams, personally attended to all matters pertaining to said insurance policy and the payment of premiums thereon; that she never knew of any contract with said defendant except the policy sued on, nor did her husband ever have any authority from her to change or modify that contract in any respect whatever, nor did she ever know anything of the receipts above set out or any of its provisions until the same was found among the papers of her husband after his death, nor did she know that any note had been executed to said defendant, or that any part of any premium upon said policy or any sum due upon any note given therefor was unpaid until after the death of her said husband, but, on the contrary, supposed and believed that all premiums had been paid as provided in said policy, until the proofs of death of said insured were made to defendant and payment of said policy demanded by her of the defendant.

And plaintiff says she is willing and offers to set off any balance due on the said note against the amount due by the defendant by the terms of said policy.

And the plaintiff further says that on or about the 17th day of December, 1885, said Kneeland T. Adams departed this life at the city of Indianapolis, Indiana, and that thereafter due notice and satisfactory proofs of the death of the insured, Kneeland T. Adams, were made and delivered by the plaintiff to said defendant.

And plaintiff further says that more than sixty days have elapsed since said notice and proofs of death of said insured were given to the defendant as aforesaid.

And the plaintiff further says that she has kept and performed

all the conditions and agreements by her to be kept and performed as provided in said policy of insurance.

And the plaintiff also says that the defendant now neglects
6 and refuses to pay to her the amount due upon said policy, although she has often requested payment thereof from said defendant.

Wherefore the plaintiff prays judgment against the defendant for the sum of twelve thousand dollars, and for all proper relief.

HARRISON, MILLER & ELAM,
Att'ys for Plaintiff.

EXHIBITS "A" & "B."

7 *Exhibit "A."*

Copy.

The Michigan Mutual Life Insurance Company, Detroit, Michigan.

[Vignette.]

Premium, $339.70; amount, $10,000.

Age, 47; No. 12711.

In consideration of the representations and agreements made to and with it in the application for this policy, and of the sum of three hundred and thirty-nine dollars and seventy cents, to it paid by Kneeland T. Adams, doth hereby promise and agree to pay to Elizabeth B. Adams the sum of ten thousand dollars at its office, in the city of Detroit (any unpaid balance of the current year's premium, or any other indebtedness to the company on account of this policy being first deducted therefrom), for her sole use, if living, in conformity with the statute, and, if not living, to the children of Kneeland T. and Elizabeth B. Adams, or their guardian for their use; or if there be no such children surviving him, then to the executors, administrators, or assigns of the said Kneeland T. Adams in sixty days after due notice and satisfactory proof of death of the said Kneeland T. Adams, of Indianapolis, county of Marion, State of Indiana, provided such death shall occur on or before twelve o'clock at noon of the sixteenth day of February, eighteen hundred and seventy-eight.

And the said company do further promise and agree to and with the insured that this policy of insurance may be renewed by the payment, on or before the sixteenth day of February in each year, of the stipulated premium (or the corresponding semi-annual equivalents), at the date of such renewal, in accordance with the official schedule of rates for each thousand dollars insured, as printed on the back of this policy, provided that all the conditions and agreements upon which this policy was issued shall have been faithfully and fully performed. Any excess of payment beyond the stipulated payments aforesaid on this policy will be placed to the credit of the insured as a deposit, which, with the net interest thereon, as declared

by the company, may be withdrawn at the end of any policy year on thirty days' previous notice in writing given to said company, or the same will be applied towards the payment of the next premium falling due upon this policy, or, in case of death, will be paid in addition to the sum insured.

This policy is issued, and the same is accepted by the insured, on the following conditions:

1st. If the said person hereby insured shall pass beyond the settled limits of the United States or the Dominion of Canada, or, between the first day of July and the first day of November, south of the 34th parallel of north latitude, or shall enter upon a voyage on the high seas, excepting to pass as passenger on first-class vessels along the coasts of the United States and the Dominion of Canada, or between the United States and ports of Europe lying north of the 42d parallel of north latitude, in which parts of Europe travel and residence are permitted, provided no ports are entered in which residence is especially prohibited at the time of such entrance; or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or regularly employed in working or managing a steam-engine in any capacity, or as a mariner, engineer, fireman, conductor, or laborer in any capacity upon service upon any steam or sail vessel, or upon railroad trains, or shall enter any military or naval service whatsoever (the militia not in actual service excepted) without previously obtaining the consent of this company in writing; or if he shall die by his own hand, or in consequence of a duel, or of the violation of any law of any nation, State, or Province, or shall engage in, aid, or abet any insurrection against the Government of the United States or any State thereof; or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then in every such case this policy shall be null and void, and all payments thereon shall be forfeited to the company.

2d. If the several premiums in renewal of this policy shall not be paid on or before the time when due, at the office of the company, or to agents who produce receipts signed by the president or secretary, then and in every such case the company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine.

3d. If this policy is assigned or held as security, written notice shall be given to the company and proof of interest produced with proof death.

In witness whereof the said Michigan Mutual Life Insurance Company, at its office in Detroit, by its president and secretary, have signed and delivered this policy this sixteenth day of February, in the year one thousand eight hundred and seventy-seven.

(Signed) J. S. FARRAND, *President.*
(Signed) JNO. T. LIGGETT, *Secretary.*

Renewable term policy—wife's form, without participation.

[Endorsed:] No. 12711. The Michigan Mutual Life Insurance Co., Detroit. Insurance on the life of Kneeland T. Adams. Amount, $10,000; date, Feb'y 16th, 1877. Renewable term policy. A premium due 16th February, $339.70. Register D. Renewable term policy—wife's form, without participation.

7½ *Exhibit B.*

Present age.	Schedule of rates to secure $1,000, payable at death, without participation in surplus.		Present age.	Schedules of rates to secure $1,000, payable at death, without participation in surplus.	
	First year.	Subsequent years.		First year.	Subsequent years.
25	$17 26*	.....	48	$35 50*	$17 68
26	17 63*	$11 62*	49	37 16*	18 48
27	18 02*	11 72*	50	38 95*	19 39
28	18 43*	11 82*	51	40 88*	20 42
29	18 87*	11 92*	52	42 95*	21 58
30	19 34*	12 04*	53	45 18*	22 87
31	19 83*	12 16*	54	47 59*	24 31
32	20 35*	12 29*	55	50 19*	25 91
33	20 91*	12 44*	56	52 99*	27 69
34	21 49*	12 61*	57	56 00*	29 67
35	22 12*	12 78*	58	59 24*	31 85
36	22 79*	12 96*	59	62 74*	34 26
37	23 49*	13 18*	60	66 52*	36 94
38	24 26*	13 41*	61	70 60*	39 89
39	25 06*	13 67*	61	75 00*	43 16
40	25 93*	13 95*	63	79 74*	46 75
41	26 85*	14 26*	64	84 86*	50 71
42	27 83*	14 59*	65	90 40*	55 08
43	28 89*	14 97*	66	96 37*	59 90
44	30 03*	15 38*	67	102 83*	65 21
45	31 24*	15 86*	68	109 80*	71 05
46	32 56*	16 39*	69	117 31*	77 46
47	33 97	17 00*	70	125 41*	84 48

* Lines marked with a star (*) are erased in copy.

These premiums may be paid by semi-annual installments if preferred, the semi-annual rate being 52 per cent. of the annual.

The rates in this table are not extended beyond the age of seventy for the reason that life assurance is very rarely kept up after that age; and, if kept up, it would probably be for the interest of the assured to convert his policy into one providing by equal annual payments for later years.

8 And afterwards, to wit, at the May term of said court, on the 6th day of May, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McMaster & Boice, its attorneys, and files its demurrer to the complaint herein in the words following, to wit:

Comes now the defendant and demurs to the declaration in the above-entitled cause because the same does not state facts sufficient to constitute a cause of action.

McMASTER & BOICE,
Att'ys for Defendant.

And afterwards, to wit, at the May term of said court, on the 27th day of July, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by counsel, and thereupon the court, being sufficiently advised, doth now overrule the demurrer of the defendant to the complaint herein; to which ruling of the court the defendant now excepts.

And afterwards, to wit, at the May term of said court, on the 28th day of October, A. D. 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McMaster & Boice, its attorneys, and files its answer herein in the words following, to wit:

Comes now the defendant, The Michigan Mutual Life Insurance Company and, for answer to the declaration, says that it admits the execution of the policy sued upon in the manner and form set forth in plaintiff's declaration, and admits that Kneeland T. Adams, whose life was insured thereby, departed this life on the 17th day

9 of December, 1885; but the defendant says that plaintiff ought not to have and maintain this action, for that said policy is a "renewable term policy" and "without participation in surplus," as shown in the indorsements on the back thereof; and a schedule of rates as to premiums necessary to be paid to secure each $1,000.00 of insurance is also indorsed on back of said policy, said rates being graduated so that they increase with the age of the insured; that such terms and such indorsements on a policy or contract of life insurance have a distinct and definite meaning in the business of life insurance; that said meaning is that each year's insurance is independent of other years; that the premium of each year is to pay for the risk of that year, and is fully consumed, earned, and exhausted at the end of that year, and that a policy so indorsed is without surrender value; and defendant says that such was the meaning of the policy sued upon in this action. And the defendant further says that when the premium on said policy became due, on the 16th day of February, 1885, the plaintiff made no offer of any kind to pay the same to the defendant or to any person for

the defendant, and furnished no means to her husband, Kneeland T. Adams, to make such payment, and gave him no instructions whatever in regard to its payment or the renewal of said policy.

And defendant says that said Kneeland T. Adams, when said premium on said policy became due, on the 16th day of February, 1885, said and represented to said defendant that he could not pay the said premium in money, but that he would pay the sum of $59.10 in cash and execute his note at four months for $200.00, said Adams being then fifty-five years old and said premium for that year being the sum of $259.10; that the company then consented and agreed to receive said cash payment and said note upon the terms and conditions set forth in the receipt set out in the plaintiff's declaration and not otherwise.

And defendant further says that said Kneeland T. Adams personally attended to all matters pertaining to said policy of insurance and the payment of the premiums thereon from the time said policy was issued in 1877; and that the plaintiff never claimed the right to pay the premiums on said policy or to make arrangements for its renewal, or that she had a right to say upon what terms it should be renewed, but left the whole matter to said Kneeland T. Adams without instructions or directions of any kind and without giving any notice of any kind to this defendant that said Adams was not fully empowered to make any arrangements for the renewal of said policy that he saw fit; nor did said plaintiff ever give to this defendant any notice that she claimed that said Kneeland T. Adams did not have such right.

That when the premiums for the years of 1880, 1881, 1882, 1883, and 1884, respectively, became due, said Kneeland T. Adams was unable to pay the same in money and gave his note for the greater portion of each of said premiums, and in each instance such note was received by the defendant upon the same conditions upon which the note of February 16th, 1885, was received, and in each instance a receipt was given by the said company to said Adams containing and expressing the same conditions as to payment of the note that were contained and expressed in said receipt of February 16th, 1885.

That the plaintiff never objected to the receipts so given by the defendant for the said years of 1880, 1881, 1882, 1883, and 1884, or notified this defendant that she claimed that said Kneeland
11 T. Adams was not authorized to make such terms.

And said defendant further says that when said note, given by the said Adams for a part of the premium due February 16th, 1885, became due payment thereof was demanded of said Adams and refused; that afterwards, on the 7th day of October, 1885, said Adams paid this defendant $110.00 on said note, but without any agreement for an extension of the time of payment of the remainder of said note, and after the payment of said sum of $100.00, and during said month of October, 1885, this defendant demanded of said Adams the payment of the remainder of said note, which was refused by said Adams, and the same has never been paid by him or any one else.

And defendant denies that by the terms of said policy any agreement was made with the plaintiff. It avers that the entire contract of insurance contained therein is with the insured, Kneeland T. Adams, and that plaintiff's only connection with said policy is that by the agreement with the insured the loss is payable to her.

This defendant denies that the facts set forth in the declaration as to the premium due February 16th, 1885, make a full payment of such premium. It denies that the conditions of the receipt given when the note for a part of said premium was taken changed any part of the contract contained in said policy. The policy provides for the payment of the premium in cash only and at the time specified, and this defendant consented to defer such cash payment only as provided in the renewal receipt.

Defendant further avers that the portion of the premium due in 1885, paid by said Kneeland T. Adams, was not sufficient if
12 applied *pro rata* to carry the insurance to the date of his death, and that at time of such death defendant had no money in its hands which equitably applied could keep alive such insurance.

McMASTER & BOICE,
Att'ys for Def't.

And afterwards, to wit, at the November term of said court, on the 9th day of November, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the plaintiff, by Harrison, Miller & Elam, her attorneys, and files her demurrer to the answer herein in the words following, to wit:

The plaintiff demurs to the answer of defendant herein, and for cause says said answer does not state facts sufficient to constitute a defence to this action.

HARRISON, MILLER & ELAM,
Plaintiff's Att'ys.

And afterwards, to wit, at the November term of said court, on the 11th day of November, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Come now the parties, by their respective attorneys, and thereupon the court, being sufficiently advised in the premises, sustains the plaintiff's demurrer to the answer herein; to which ruling of the court the defendant, by its attorneys, now here excepts.

And afterwards, to wit, at the November term of said court, on the 6th day of December, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

13 Come now the parties in the above-entitled cause, and the demurrer of plaintiff to defendant's answer having been sustained, and defendant failing and refusing to amend said answer,

and electing to stand thereon and upon its exceptions to the rulings of the court herein without pleading further, upon plaintiff's motion said cause is now submitted to the court; and the court, being fully advised in the premises, finds that there is due from the defendant to the plaintiff on the policy sued upon the sum of ten thousand three hundred and twenty-four dollars and fifteen cents ($10,324.15).

It is therefore considered and adjudged by the court that the plaintiff, Elizabeth B. Adams, recover of and from the defendant, The Michigan Mutual Life Insurance Company, the sum of ten thousand three hundred and twenty-four dollars and fifteen cents ($10,324.15), and her costs herein, taxed at $—.

To which finding and judgment the defendant objects and excepts, and the defendant now prays a writ of error to the Supreme Court of the United States, which is granted upon the filing of a bond in the penalty of $15,000.00, with sureties to the satisfaction of the court.

And afterwards, to wit, at the November term of said court, on the 9th day of December, 1886, before the Honorable William A. Woods, judge as aforesaid, the following further proceedings in the above-entitled cause were had, to wit:

Comes now the defendant, by McMaster & Boice, its attorneys, and files its bond herein in the sum of $15,000.00, with Jacob S. Farrand and William A. Butler as sureties thereon; which bond is approved by the court, and is in the words following, to wit:

Know all men by these presents that we, The Michigan Mutual Life Insurance Company, as principal, and Jacob S. Farrand and William A. Butler, as sureties, are held and firmly bound unto the above-named Elizabeth B. Adams in the sum of fifteen thousand dollars ($15,000), to be paid to the said Elizabeth B. Adams; to which payment, well and truly to be made, we bind ourselves, jointly and severally, and our and each of our heirs, executors, and administrators, jointly by these presents.

14

Sealed with our seals and dated this 8th day of December, 1886.

Whereas the above named, The Michigan Mutual Life Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the district of Indiana:

Now, therefore, the condition of this obligation is that if the above named, The Michigan Mutual Life Insurance Company, shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged or awarded against it if it shall fail to make good its plea, then this obligation to be void; otherwise in full force.

MICHIGAN MUTUAL LIFE INSURANCE COMPANY, [SEAL.]
By O. R. LOOKER, *Secretary.*
JACOB S. FARRAND. [SEAL.]
WM. A. BUTLER. [SEAL.]

Sealed and delivered in presence of—
C. A. KENT.

Taken and approved by me this ninth day of December, 1886.
WM. A. WOODS.

I certify that the above sureties are amply responsible for the amount named.
Dec. 8, 1886.

H. B. BROWN,
Dist. Judge.

15 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States of America to the judges of the circuit court of the United States for the district of Indiana, Greeting:

Because on the record and proceedings as also on the rendition of a judgment in a plea which is in the said circuit court before you, between Elizabeth B. Adams, who was plaintiff in said circuit court, and The Michigan Mutual Life Insurance Company, who was defendant in said circuit court, a manifest error hath happened, to the great damage of the said The Michigan Mutual Life Insurance Co., as by *his* complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid on this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the 2d Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court this 6th day of December, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

16 Supreme Court of the United States, for the October Term, A. D. 1887.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error.

vs.

ELIZABETH B. ADAMS, Defendant in error.

Before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes now the plaintiff in error, the said Michigan Mutual Life Insurance Company, by its

attorneys, and says that in the records and proceedings in the circuit court of the United States for the district of Indiana, in said cause, there is manifest error in this, to wit:

1. The said circuit court erred in said cause in overruling the demurrer of said Michigan Mutual Life Insurance Company to the declaration of said Elizabeth B. Adams.

2. The said circuit court erred in said cause in sustaining the demurrer of said Elizabeth B. Adams to the answer of said Michigan Mutual Life Insurance Company.

17 3. The finding and judgment of said circuit court in favor of said Elizabeth B. Adams and against said Michigan Mutual Life Insurance Company in said cause are erroneous and contrary to law.

And the said Michigan Mutual Life Insurance Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by reason of said judgment.

CHARLES A. KENT,
JOHN L. McMASTER,
AUGUSTINE BOICE,
Attorneys for Plaintiff in Error.

18 *Citation.*

United States of America to Elizabeth B. Adams, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Indiana, wherein The Michigan Mutual Life Insurance Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the U. S., this 6th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

On this 6th day of December, in the year of our Lord one thousand eight hundred and eighty-six, the plaintiff, Elizabeth B. Adams, acknowledges the personal service of the within citation on her.

ELIZABETH B. ADAMS,
By HARRISON, MILLER & ELAM,
Her Attorneys.

19 UNITED STATES OF AMERICA, } ss:
District of Indiana, }

I, Noble C. Butler, clerk of the circuit court of the United States for the district of Indiana, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in the cause of Elizabeth B. Adams *vs.* The Michigan Mutual Life Insurance Company, as fully as the same appears of record and remains on file in my office.

Witness my hand and the seal of said court, at Indianapolis, in said district, this 14th day of December, A. D. 1886.

[Seal Circuit Court of the United States, District of Indiana.]

NOBLE C. BUTLER, *Clerk.*

Endorsed on cover: Indiana C. C. U. S. No. 1333. The Michigan Mutual Life Insurance Company, plaintiff in error, *vs.* Elizabeth R. Adams. Filed January 28, 1887.

Supreme Court of the United States.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY,
Pl'ff in Error,
vs.
ELIZABETH R. ADAMS,
Def't in Error.

PETITION FOR REHEARING.

To the Supreme Court of the United States:

The petition of the Michigan Mutual Life Insurance Company respectfully shows:

1. That the above cause was argued on Tuesday, April 22nd, 1890.

2. That as it is informed and believes and therefore avers, the judgment of the court below was affirmed on Monday, April 28; that no opinion was given in the case and no reason for such affirmance; that the chief justice in announcing the judgment said that it was by a divided court.

3. That at the hearing of the cause only eight judges were in attendance, Justice Field being absent.

4. That the cause involves about thirteen thousand dollars, ($13,000.)

5. That the cause involves questions as to the validity of the contracts under which this petitioner is doing busines of the very greatest importance to it, that if these contracts are invalid, it desires to change them, and that for this purpose, it is necessary to know the grounds on which the judgment was affirmed; that the court below, though earenstly urged by the counsel for this petitioner, absolutely refused to write an opinion or to state the grounds on which he gave judgment for the plaintiff; that as a consequence of this action of the court below, and of this court, your petitioner is obliged to pay the judgment without the advantage of knowing on what ground it was rendered. Your petitioner submits that it is entitled to know the grounds of said judgment, and that if as is presumed the court were evenly divided, it is entitled to the judgment of the full bench. It therefore respectfully asks for a rehearing of this cause.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY, by

O. R. LOOKER,
Secretary.

C. A. KENT,
Of Counsel.

STATE OF MICHIGAN, }
COUNTY OF WAYNE, } ss.

Charles A. Kent, being duly sworn, says that as counsel for the said Mutual Life Insurance Company, he argued the above cause in the court below, and in this court: that he makes this affidavit because familiar with the facts; that he has read the preceding petition and knows the facts therein stated of his own

knowledge, except where they are stated on information and belief, and that he believes these true.

CHARLES A. KENT.

Subscribed and sworn to this 2nd day of May, A. D., 1890, before me,

E. C. WALKER,
Notary Public,
Wayne County, Michigan.

I, Charles A. Kent, counsel for the Michigan Mutual Life Insurance Company, hereby certify that I have read the foregoing petition and that in my opinion it sets forth sufficient grounds for a rehearing of the above cause. I further certify that in my opinion the judgment of this court in said case is both unjust and contrary to law.

CHARLES A. KENT.

SUPREME COURT, U.S.
FILED
FEB 15 1890
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

October Term, A. D. 1889.

No. 287.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error.
vs.
ELIZABETH R. ADAMS.

BRIEF FOR PLAINTIFF IN ERROR.

C. A. KENT,
Of Counsel for Pl'ff in Error.

Supreme Court of the United States.

October Term, A. D. 1889. *No. 287.*

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error.
vs.
ELIZABETH R. ADAMS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Plaintiff in error, defendant in the court below, is a Life Insurance Company. This suit was brought on a policy, dated Feb'y 16, 1877, on the life of the husband of Mrs. Adams, plaintiff below, in the Circuit Court of the United States for the District of Indiana.

A demurrer to the declaration was filed and overruled by the court. A plea was then filed to which plaintiff below demurred and this demurrer was sus-

tained and final judgment given in her favor for the whole amount claimed.

The error alleged is in substance, that the judgment should have been for defendant.

The material facts, which appear in the pleadings, are as follows: February 16, 1877, Kneeland T. Adams, husband of plaintiff, insured his life with defendant. The money was paid by the husband, and all the covenants in the policy are with him, save that the amount of the insurance is payable to her if living, when it accrues, and if not, then to their joint children, and if none of these are living, to his personal representatives.

The policy is on the renewable term plan, without participation in the profits. There is an absolute insurance for one year, and a right at the end of each year to renew on the payment of a sum constantly increasing with the age of the insured. On such policies, there is no reserve, and no right at the expiration of a year, save that of renewal. The policy was regularly renewed until February 16, 1885. Mr. Adams attended to the payment of all the premiums. Mrs. Adams does not appear to have had any communication with agents of the company.

For several years prior to 1885, notes were given for parts of the premium, and receipts, like the one given Feb'y 16, 1885. The policy contains no provision for the taking of notes for premiums. It contains the usual provisions for the termination of the policy, if the premiums are not paid on the day named.

The premiums which came due Feb'y 16, 1885, was $259.10. Mr. Kneeland was unable to pay the

whole in cash, but did pay $59.10 and gave his note for the payment of the remainder, $200.00, in four months. At that time, he received this receipt:

The Michigan Mutual Life Insurance Company.
$259.10. Detroit, Mich., Feb'y 16th, 1885.

Received two hundred fifty nine and 10 100 dollars, being the annual premium due this day on policy No. 12,711, continuing the same in force until 12 o'clock noon of the 16th day of February, 1886, on the life of Kneeland T. Adams, of Indianapolis, Ind.; provided, that if any note or other obligation has been given for such premium or any part thereof, and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment, the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same.

O. R. LOOKER,
Secretary.

No payment was made on said note, until Oct. 7, when $110.00 was paid. The time for payment was never extended. The note is now in the hands of the company, and has never been tendered to Mrs. Adams. Mr. Adams died Dec. 18, 1885. The sum paid was not sufficient if applied *pro rata* to have kept the insurance in force until the death of the insured.

The company defends solely on the ground, that the note given for the last premium was not paid in full, though long past due at the time the insured died.

Plaintiff in the court below claimed, that the

contract of insurance was with her and not with her husband, that the contract in the receipt was an attempt to vary the terms of the policy which did not bind her, that under this receipt, the policy would not cease to be binding on the company in consequence of the non payment of the note, until notice of such intention had been given, and that plaintiff could elect to avail herself of that part of the receipt which continued the insurance to Feb'y 16, 1888, without being bound by the provision exempting the company from loss during the non-payment of the note.

I.

There can be no question that under the terms of the policy, the insurance would have ceased on the 16th day of February, 1885, except for the giving of the note.

Klein vs. Insurance Co., 104, U. S. 88.
Thompson vs. Ins. Co., do 252.

Plaintiff has no rights, except they were gained by the giving of the note in question, and the receipt for the premium contemporaneous therewith.

II.

If the contract contained in the receipt of Feb'y 16, 1885, binds plaintiff, it is a complete bar to her recovery. The meaning of this contract is plain. Under it, by the receipt of the note, the insurance was continued until its maturity. After that, while the note continued unpaid, in whole or in part, there was no insurance, but the insurance would revive whenever the note was fully paid, and such payment was

at the option of the maker. The note was at all times after it was due subject to collection by the company. The possession of the note by the company after it became due, and the receipt of a partial payment was strictly in accordance with the terms of the contract, and perfectly consistent with the position, that it is not liable for any loss occurring, while any part of the note was due or unpaid.

It is settled by a unanimous current of decisions, that where losses occur, when notes given under such contracts are due and unpaid, there is no liability therefor.

Wall vs. The Home Ins. Co., 36 N. Y., 157, (1867.)
Williams vs. The Albany City Ins. Co., 19 Mich., 451, (1870.)
McIntyre vs. Mich., State Ins. Co., 52 Mich. 188, (1883.)
Watrous vs. Miss. Valley Ins. Co., 35 Iowa 582, (1872.)
Nelson vs. Farmer's Ins. Co., 43 Iowa, 24, (1876;) 44 Iowa, 540 and 553, (1876.)
Gordon vs. Dodge Co. Mutual Ins. Co., 39 Wis., 121, (1875.)
Joliff vs. Madison Mutual Ins. Co., 39 Wis., 111, (1875.)
American Ins Co. vs. Henley, 60 Ind., 515, (1875.)
American Ins. Co. vs. Leonard, 80 Ind., 272, (1881.)
Willicutts vs. N. W. Mut. Life Ins. Co., 81 Ind., 300, (1882.)
Fendre vs. N. C. Mut. Home Ins. Co., 68 N. C. 11, (1875.)
Carlin vs. Phoenix Ins. Co., 78 Cal., 619, (1889.)
Continental Ins. Co. vs. Daly, 33 Kansas, 601, (1885.)

And contracts that policies shall be rendered void by the non-payment of premium notes, are sustained in this court.

Klein vs Ins. Co., and Thompson vs. Ins. Co., 104 U. S., 88 and 252.
Life Ins. Co. vs, Pendleton, 112 U. S., 696.

It was contended in the court below, that the contract in question made the policy only voidable at the election of the company, and that the retention of the note and the receipt of part payment was inconsistent with an election to avoid, and reliance was had on,

Ins. Co. vs. French, 30 Ohio State, 240, (1876.)

The reply is that in that case, there was no provision that the note could be collected, and the retention of a note for an unearned premium was inconsistent with the idea that the policy was void. But in the case at bar, the contract does not declare that the policy shall be void on the non-payment of the premium, and the policy may be made good at any time at the option of the insured. The point was raised and decided adversely to plaintiff's claim in several of the above cases.

19 Mich.; 52 Mich.: 39 Wis., 121; 68 N. C., and 78 Cal.

In 39 Wis., 121, the distinction is clearly pointed out between cases like the one at bar, and cases where the provision of the contract is only that the policy shall be void on the non-payment of a note.

In *Thompson vs. Ins. Co.*, 104, U. S., 252, this court refused to follow the 30 Ohio, in a case resembling it much more than the one at bar.

A distinction was sought to be made in the court below between the cases cited and the one at bar, on the ground, that in them, the contract relied on was in the policy, but here only in the receipt. This distinction cannot be material. The place where a contract, entered into between competent parties, is made is of no consequence.

When the premium on the policy in suit became due, plaintiffs' husband, had the option to pay the money, or let the policy lapse. If he could not pay the premium in cash, he had the right to enter any new agreement with the company to prevent a lapse.

The right of both parties to enter into a new contract as to the payment of the premium was as complete as their right to make the agreement in the policy. In 39 Wis., 121, the agreement is found only in the notes.

III.

In the case at bar, the contract by which the policy was renewable from year to year, on the payment of the premium, was expressly with plaintiff's husband. Record, p. 4, and the second clause of the policy.

It reads thus, "And the said company do further promise and agree to and with the insured, that this policy of insurance may be renewed by the payment on or before the sixteenth day of February in each year of the stipulated premium." He could pay the premium, and if he could not pay it in cash, he must have had the right to make any terms of credit to which the company would agree. Such a right is for

the benefit of the beneficiaries, as otherwise the policy might lapse.

Nor does it affect this right, that the interest of the beneficiaries, the wife and children were vested, and could not be taken away by any agreement between the husband and the company. All their rights were dependent on the payment of the renewal premiums, and it is plain, that such payment was expected of the husband. If he could not pay except in cash without the consent of the wife, the consent of the children was also necessary, and as these may have been infants, such a consent might not bind them, and so the company would have been powerless to accept any thing but cash, a result which might have destroyed the interests of the beneficiaries.

In *Baker vs. The Union Mutual Life Ins. Co.*, 43 N. Y., 283, a policy like the one under consideration was held a contract with the husband, though his wife was the sole beneficiary. In *Washington Central Bank vs. Hume*, 128, U. S., 195, the distinction between contracts of insurance made with the wife, and contracts in which she is merely the beneficiary is noticed.

The question is analogous to that arising in fire policies, when the loss is made payable to a mortgagee. Here it is held that the contract is with the mortgagor.

Carpenter vs. The Provident Washington Ins. Co., 16 Pet., 495, (1842.)

Van Buren vs. St. Joseph Fire Ins. Co., 28 Mich., 398, (1874.)

IV.

The plaintiff is bound by the contract contained in the receipt of February 16, 1885, even though it be held that the contract is with her alone.

1. Under the facts of the case, the husband was authorized to make such contract as her agent. She must have known, that the payment of premiums was necessary to keep the policy alive. She trusted her husband to make such payments. If she ever inquired how the premiums had been paid, she must have learned, that frequently, they had been paid by note subject to the usual conditions in case of non payment. If she did not inquire, the inference is still stronger, that she trusted him to act for her, in such way as he thought best. The husband was certainly the wife's agent in paying the premiums. His power was implied, not express, and it must have extended to payments in any of the usual ways, such as giving notes, subject to the usual conditions.

It was said in the court below, that though the husband was the wife's agent, he had no power to change the conditions of the policy. He did not attempt this, but as he had power to pay or not pay the premium, he must have had the power to accede to such conditions of receiving credit as the company required.

As it appears, that he did not have the money to pay the whole premium when it was due, he must have had the power to keep the policy alive by giving a note, for this was an act clearly beneficial to his wife and children. And plaintiff does not dispute her husband's power to give a note, for it is only by the note,

that there is any pretence that the policy was kept alive until his death. Her claim is, that he could not give a note with the conditions attached. But it is plain that the company would have received no other; as the company were under no obligations to take any note, they could affix to it such conditions as they chose, and plaintiff's husband must have had authority to give such a note or no authority of any value.

2. Though the act of the husband in giving a note for the premium subject to the conditions of the receipt, was unauthorized, the plaintiff cannot claim as she does, through the note and repudiate its conditions. The general doctrine is perfectly settled, that a person cannot ratify one part of a contract, made by one who acted as his agent and repudiate another part.

Gaines vs. Miller, 111 U. S., 395.
Story on Agency, 8th Ed., Sec. 250.
Mechem on Agency, Sec. 130.

The following are insurance cases where this doctrine has been applied.

Tasker vs. Kenton Ins. Co., 59 N. H., 438. (1879.)

In this case a person engaged an insurance agent to get certain property insured in good companies. One policy was made out, but not delivered, containing a provision that suit must be brought in a year. Suit was brought after a year, and plaintiff sought to avoid the provision as unauthorized. He had not seen the policy until after the loss, nor did he know its contents. It was held that the policy must be

taken as an entirety. Plaintiff could not adopt one part and repudiate another.

Harnickell vs. N. Y. Life Ins. Co., 111 N. Y., 390, (1888.)

Jacoway vs. German Ins. Co., 49 Arkansas, 320.(1888.)

In these cases, applicants for insurance gave their notes for premiums under an arrangement that certain things should be satisfactory before they accepted the policies. The companies issued policies which were not satisfactory and refused to surrender the notes, on the ground, that their agents had no power to make such contracts. Held, that the contracts could not be divided, that they must be ratified or rejected wholly.

The case of *Baker vs. The Union Mutual Life*, 43 N. Y., 283 (1871,) is directly it point. There the wife sought to recover a policy, where the premium had been settled for by the husband, by giving his note, with a condition of forfeiture, if not paid at maturity. She testified, that her husband showed her the policy, and that she did not know that the premiums had not been paid.

After first deciding that the contract was really with the husband though the wife was the beneficiary the court says, (p. 288.) "The case will not be changed if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and defendant. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff, and claiming the benefit of his acts and of the policy procured by his agency, she necessarily ratifies and affirms the contract, as it was made, with all its terms and conditions. She adopted the acts of the agent and makes them her own."

Plaintiff sought in the court below to bring her case under an exception to the rule, that a principal must adopt the acts of his agent wholly or not at all, and cited the following cases:

Smith vs. Tracy, 36 N. Y., 79.
Cooley vs. Perrine, 41 N. Y. Law, 322.
Bryant vs. Moore, 26 Maine, 84.

These are cases of the sale of personal property by an agent, who, without authority gave a warranty, and it was held that the receipt of the proceeds by the principal in ignorance of the warranty was not an adoption of the warranty.

The difference between these cases and that at bar is very great. In them, the principal parted with property of value; the agent was guilty of misrepresentations; the purchaser was bound to make inquiry as to the extent of the agent's authority; the agreement set aside was collateral to the main agreement; it was against the interest of the principal.

In the case at bar, plaintiff has never given the defendant anything. It has none of her property. Her husband was guilty of no misrepresentations of the facts to her. If she did not know everything, it must be presumed to have been, because she did not inquire. Nor is the defendant guilty of any negligence. Its agent had every reason to think that the contract made with the husband was with the full approval of the wife. It was just the same contract, which had been made several times before without objection from her. It was a contract favorable to her, since only thus could her interest in the policy be preserved. It was a contract, which the husband was under no obliga-

tion to make. What he did was a gift to the wife and she could not complain of him, that his gift was accompanied with a condition. Nor can she complain of the defendant which was under no obligation to accept anything but money in renewal of the policy. Again the condition as to the payment of the note, was a part of the contract to renew the policy for one year. I think this is the only case which can be found, in which a court has done, what was done in the court below, stricken out a vital condition in a promise, and allowed a recovery, as though the promise had been absolute. The result is that the defendant has been held on a promise, it never made, and which presumably, it never would have made if it had been asked.

I submit that the judgment of the court below should be reversed, and judgment entered for plaintiff in error, defendant in the court below.

C. A. KENT,

Of Counsel for Pl'ff in Error.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 287.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
ELIZABETH B. ADAMS,
Defendant in Error.

In Error to the United States Circuit Court for District of Indiana.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN L. McMASTER,
AUGUSTIN BOICE,
Of Counsel for Plaintiff in Error.
INDIANAPOLIS, IND.

FRANK H. SMITH, 22 N. PENN. ST.

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Supreme Court of the United States,

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No. 287.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY, *Plaintiff in Error,* *vs.* ELIZABETH B. ADAMS, *Defendant in Error.*	*In Error to the United States Circuit Court for District of Indiana.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

This case comes into this Court on a writ of error to the United States Circuit Court for the District of Indiana. (R. p. 11).

The action was commenced in the Circuit Court, April 23, 1886, by Elizabeth B. Adams, the defendant in error, against The Michigan Mutual Life Insurance Company, the plaintiff in error, on a policy of insurance for $10000, issued by said company upon the life of her husband, Kneeland T. Adams, February 16, 1877.

The questions presented for decision by this Court, arise upon the rulings of the Circuit Court, on the demurrers to the declaration and answer, and in rendering

final judgment for the amount of said policy against the plaintiff in error.

The declaration, omitting the title, is as follows, to-wit:

"The plaintiff, Elizabeth B. Adams, who is a citizen of the State of Indiana, complains of the defendant, The Michigan Mutual Life Insurance Company, of Detroit Michigan, a corporation organized under the laws of the State of Michigan, having her principal office and place of business in the city of Detroit, in said state, and a citizen of said State of Michigan, and says that on or about the 16th day of February, 1877, in consideration of the sum of $339.10, then and there paid to the defendant by Kneeland T. Adams, who was then and there the husband of the plaintiff, said defendant issued and delivered to this plaintiff its policy of insurance numbered 12711, a copy of which policy is filed herewith and made a part hereof, and marked Exhibit "A," and thereby promised and agreed to pay to this plaintiff the sum of ten thousand dollars (first, however, deducting any unpaid balance of the current year's premium, or any other indebtedness to the company on account of this policy) in sixty days after due notice and satisfactory proof of the death of the said Kneeland T. Adams, provided such death occurred on or before twelve o'clock at noon of the 16th day of February, 1878.

And plaintiff says that said policy of insurance also contained the further agreement with plaintiff that said policy might be renewed by the payment, on or before the 16th day of February in each year, of a stipulated sum or corresponding semi-annual equivalents, at the date of such renewal, in accordance with official schedule of rates for each one thousand dollars insured printed on the back of said policy, a copy of which rates is also filed herewith and made a part hereof, and marked Exhibit "B."

And the plaintiff further says that on or about the 15th day of July, 1884, the defendant issued and delivered to her the following additional agreement as a part of said policy of insurance, which she then and there accepted and adopted, to-wit:

The Michigan Mutual Life Insurance Company.

Incontestable policy clause.

No. 12711. Name, K. T. Adams.

Provided that after three years from date of this policy, and the payment in cash of three years' premiums, the liability of the company shall not be disputed because the death of the assured was caused by his own act or because of any misrepresentations in the application, not wilful, save that if the age of the assured is understated the company shall only be liable for such an amount as the premiums received would have paid for at the rates as charged by the company at that date for persons of the insured's real age.

O. R. LOOKER, *Secretary.*

And plaintiff says that all the premiums due on said policy of insurance were paid in full as they matured, and said policy was kept continuously in full force and effect as therein provided until the 16th day of February, 1885.

That the premium which fell due on the 16th day of February, 1885, being the sum of $259.10, was paid by the insured, Kneeland T. Adams, to the defendant, as follows: Cash in hand, the sum of $59.10; and for the balance, $200.00, said insured executed and delivered his note, payable four months after date, to the order of the defendant, and thereupon the defendant executed and delivered to the said Kneeland T. Adams a receipt for said premium, which is in the words and figures following, to-wit:

The Michigan Mutual Life Insurance Company.

$259.10. DETROIT, MICH., *Feb. 16th*, 1885.

Received two hundred fifty-nine and 10-100 dollars, being the annual premium due this day on policy No. 12711, continuing the same in force until 12 o'clock noon of the 16th day of February, 1886, on the life of Kneeland T. Adams, of Indianapolis, Ind.: Provided, That if any note or other obligation has been given for such premium or any part thereof and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment the company

shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same.

O. R. LOOKER, *Secretary.*

[On margin:] Renewable term policy.

[Writen across the face in red ink:] Countersigned this 16th day of February, 1885.

A. BOICE, *Collector.*

This receipt must be countersigned across the face by the agent or collector.

And defendant then and there renewed and continued said policy in full force and effect until noon of February 16th, 1886.

And plaintiff further says that said note remained in the hands and possession of the agent or collector of defendant until the maturity thereof and long afterwards; that on or about the 7th day of October, 1885, the said Kneeland T. Adams paid to the defendant the sum of $110.00 in cash, which sum was then and there endorsed on the back of said note as a credit thereon by defendant's agent, and the defendant then and thereby continued said policy in full force and effect and waived any forfeiture thereof it any theretofore existed.

That said note continued and remained in the possession of the agent of defendant thereafter until the day following the death of the said insured, to-wit, the 18th day of December, 1885, when said agent surrendered the same to the secretary of the defendant, who took said note and now holds the same; that defendant has never at any time tendered back or offered to surrender said note to the plaintiff.

And plaintiff says that she never knew that said note was unpaid or that the receipt above set out had been given to her said husband until the proofs of death of said insured were made to defendant and payment of said policy demanded by her of the defendant, but supposed her said husband, who attended to all matters pretaining to said insurance, had fully paid all premiums on said policy.

And plaintiff says that her said husband, Kneeland T. Adams, personally attended to all matters pertaining to said insurance policy and the payment of premiums thereon; that she never knew of any contract with said defendant except the policy sued on, nor did her husband ever have any authority from her to change or modify that contract in any respect whatever, nor did she ever know anything of the receipts above set out or any of its provisions until the same was found among the papers of her husband after his death, nor did she know that any note had been executed to said defendant, or that any part of any premium upon said policy or any sum due upon any note given therefor was unpaid until after the death of her said husband, but, on the contrary, supposed and believed that all premiums had been paid as provided in said policy, until the proofs of death of said insured were made to defendant and payment of said policy demanded by her of the defendant.

And plaintiff says she is willing and offers to set off any balance due on the said note against the amount due by the defendant by the terms of said policy.

And the plaintiff further says that on or about the 17th day of December, 1885, said Kneeland T. Adams departed this life at the city of Indianapolis, Indiana, and that thereafter due notice and satisfactory proofs of the death of the insured, Kneeland T. Adams, were made and delivered by the plaintiff to said defendant.

And plaintiff further say that more than sixty days have elapsed since said notice and proofs of death of said insured were given to the defendant as aforesaid.

And the plaintiff further says that she has kept and performed all the conditions and agreements by her to be kept and performed as provided in said policy of insurance.

And the plaintiff also says that the defendant now neglects and refuses to pay to her the amount due upon said policy, although she has often requested payment thereof from said defendant.

Wherefore the plaintiff prays judgmemt against the defendant for the sum of twelve thousand dollars, and for all proper relief.

HARRISON, MILLER & ELAM,
Attorneys for Plaintiff.

EXHIBITS "A" & "B."

Exhibit "A."

Copy.

The Michigan Mutual Life Insurance Company,
Detroit, Michigan.

[Vignette.]

Premium, $339.70; amount, $10,000.

Age, 47; No. 12711.

In consideration of the representations and agreements made to and with it in the application for this policy, and of the sum of three hundred and thirty-nine dollars and seventy cents, to it paid by Kneeland T. Adams, doth hereby promise and agree to pay to Elizabeth B. Adams the sum of ten thousand dollars at its office, in the city of Detroit (any unpaid balance of the current year's premium, or any other indebtedness to the company on account of this policy being first deducted therefrom), for her sole use, if living, in conformity with the statute, and, if not living, to the children of Kneeland T. and Elizabeth B. Adams, or their guardian for their use; or if there be no such children surviving him, then to the executors, administrators, or assigns of the said Kneeland T. Adams in sixty days after due notice and satisfactory proof of death of the said Kneeland T. Adams, of Indianapolis, county of Marion, State of Indiana, provided such death shall occur on or before twelve o'clock at noon of the sixteenth day of February, eighteen hundred and seventy-eight.

And the said company do furthur promise and agree to and with the insured that this policy of insurance may be renewed by the payment, on or before the sixteenth day of February in each year, of the stipulated premium (or the corresponding semi-annual equivalents), at the date of such renewel, in accordance with the official schedule of rates for each thousand dollars insured, as printed on the back of this policy, provided that all the conditions and agreements upon which this policy was issued shall have been faithfully and fully performed. Any excess of payment beyond the stipu-

lated payments aforesaid on this policy will be placed to the credit of the insured as a deposit, which, with the net interest thereon, as declared by the company, may be withdrawn at the end of any policy year on thirty days' previous notice in writing given to said company, or the same will be applied towards the payment of the next premium falling due upon this policy, or, in case of death, will be paid in addition to the sum insured.

This policy is issued, and the same is accepted by the insured, on the following conditions:

1st. If the said person hereby insured shall pass beyond the settled limits of the United States or the Dominion of Canada, or, between the first day of July and the first day of November, south of 34th parallel of north latitude, or shall enter upon a voyage on the high seas, excepting to pass as passenger on first-class vessels along the coasts of the United States and the Dominion of Canada, or between the United States and ports of Europe lying north of the 42d parallel of north latitude, in which parts of Europe travel and residence are permitted, provided no ports are entered in which residence is especially prohibited at the time of such entrance; or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or regularly employed in working or managing a steam-engine in any capacity, or as a mariner, engineer, fireman, conductor, or laborer in any capacity upon service upon any steam or sail vessel, or upon railroad trains, or shall enter any military or naval service whatsoever (the militia not in actual service expected) without previously obtaining the consent of this company in writing; or if he shall die by his own hand, or in consequence of a duel, or of the violation of any law of any Nation, State, or Province, or shall engage in, aid, or abet any insurrection against the Government of the United States or any State thereof; or if any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then in every such case this policy shall be null and void, and all payments thereon shall be forfeited to the company.

2d. If the several premiums in renewal of this

policy shall not be paid on or before the time when due, at the office of the company, or to agents who produce receipts signed by the president or secretary, then and in every such case the company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine.

3d. If this policy is assigned or held as security, written notice shall be given to the company and proof of interest produced with proof of death.

In witness whereof the said Michigan Mutual Life Insurance Company, at its office in Detroit, by its president and secretary, have signed and delivered this policy this sixteenth day of February, in the year one thousand eight hundred and seventy-seven.

(Signed) J. S. FARRAND, *President.*

(Signed) JNO. T. LIGGETT, *Secretary.*

Renewable term policy—wife's form, without participation.

[Endorsed:] No. 12711. The Michigan Mutual Life Insurance Company, Detroit. Insurance on the life of Kneeland T. Adams. Amount, $10,000; date, February 16th, 1877. Renewable term policy. A premium due 16th, February, $339.70. Register D. Renewable term policy—wife's form, without participation.

Exhibit B.

Present Age.	Schedule of rates to secure $1,000, payable at death, without participation in surplus.		Present Age.	Schedule of rates to secure $1,000, payable at death, without participation in surplus.	
	First Year.	Subsequent Years.		First Year.	Subsequent Years.
25.....	$17 26*	.....	48.....	$ 35 50*	$17 68
26.....	17 63*	$11 62*	49.....	37 16*	18 48
27.....	18 02*	11 72*	50.....	38 95*	19 39
28.....	18 43*	11 82*	51.....	40 88*	20 42
29.....	18 87*	11 92*	52.....	42 95*	21 58
30.....	19 34*	12 04*	53.....	45 18*	22 87
31.....	19 83*	12 16*	54.....	47 59*	24 31
32.....	20 35*	12 29*	55.....	50 19*	25 91
33.....	20 91*	12 44*	56.....	52 99*	27 69
34.....	21 49*	12 61*	57.....	56 00*	29 67
35.....	22 12*	12 78*	58.....	59 24*	31 85
36.....	22 79*	12 96*	59.....	62 74*	34 26
37.....	23 49*	13 18*	60.....	66 52*	36 94
38.....	24 26*	13 41*	61.....	70 60*	39 89
39.....	25 06*	13 67*	62.....	75 00*	43 16
40.....	25 93*	13 95*	63.....	79 74*	46 75
41.....	26 85*	14 26*	64.....	84 86*	50 71
42.....	27 83*	14 59*	65.....	90 40*	55 08
43.....	28 89*	14 97*	66.....	96 37*	59 90
44.....	30 03*	15 38*	67.....	102 83*	65 21
45.....	31 24*	15 86*	68.....	109 80*	71 05
46.....	32 56*	16 39*	69.....	117 31*	77 46
47.....	33 97	17 00*	70.....	125 41*	84 48

*Lines marked with a star (*) are erased in copy.

These premiums may be paid by semi-annual installments if preferred, the semi-annual rate being 52 per cent. of the annual.

The rates in this table are not extended beyond the age of seventy for the reason that life assurance is very rarely kept up after that age; and, if kept up, it would

probably be for the interest of the assured to convert his policy into one providing by equal annual payments for later years." (R. pp. 1-6.)

To this declaration, the plaintiff in error demurred for want of facts, which demurrer was overruled by the Circuit Court, and the ruling excepted to. (R. p. 7.)

This ruling is the subject of the first assignment of error herein. (R. p. 12.)

Afterwards, the company filled its answer to said declaration; said answer is as follows, to-wit:

Comes now the defendant, The Michigan Mutual Life Insurance Company and, for answer to the declaration, says that it admits the execution of the policy sued upon in the manner and form set forth in plaintiff's declaration, and admits that Kneeland T. Adams, whose life was insured thereby, departed this life on the 17th day of December, 1885; but the defendant says that plaintiff ought not to have and maintain this action, for that said policy is a 'renewable term policy' and 'without participation in surplus,' as shown in the indorsements on the back thereof; and a schedule of rates as to premiums necessary to be paid to secure each $1,000 of insurance is also indorsed on back of said policy, said rates being graduated so that they increase with the age of the insured; that such terms and such endorsements on a policy or contract of life insurance have a distinct and definite meaning in the business of life insurance; that said meaning is that each year's insurance is independant of other years; that the premium of each year is to pay for the risk of that year, and is fully consumed, earned, and exausted at the end of that year, and that a policy so indorsed is without surrender value; and defendant says that such was the meaning of the policy sued upon in this action. And the defendant further says that when the premium on said policy became due, on the 16th day of February, 1885, the plaintiff made no offer of any kind to pay the same to the defendant or to any person for the defendant, and furnished no means to her husband, Kneeland T. Adams, to make such payment, and gave him no instructions whatever in regard to its payment or the renewal of said policy.

And defendant says that said Kneeland T. Adams, when said premium on said policy became due, on the 16th day of February, 1885, said and represented to said defendant that he could not pay the said premium in money, but that he woud pay the sum of $59.10 in cash and execute his note at four months for $200, said Adams being then fifty-five years old and said premium for that year being the sum of $259.10; that the company then consented and agreed to receive said cash payment and said note upon the terms and conditions set forth in the receipt set out in the plaintiff's declaration and not otherwise.

And defendant further says that said Kneeland T. Adams personally attended to all matters pertaining to said policy of insurance and the payment of the premiums thereon from the time said policy was issued in 1877; and that the plaintiff never claimed the right to pay the premiums on said policy or to make arrangements for its renewal, or that she had a right to say upon what terms it should be renewed, but left the whole matter to said Kneeland T. Adams without instructions or directions of any kind and without giving any notice of any kind to this defendant, that said Adams was not fully empowered to make any arragements for the renewal of said policy that he saw fit; nor did said plaintiff ever give to this defendant any notice that she claimed that said Kneeland T. Adams did not have such right.

That when the premiums for the years of 1880, 1881, 1882, 1883, and 1884, respectively, became due, said Kneeland T. Adams was unable to pay the same in money and gave his note for the greater portion of each of said premiums, and in each instance such note was received by the defendant upon the same conditions upon which the note of February 16th, 1885, was received, and in each instance a receipt was given by the said company to said Adams containing and expressing the same conditions as to payment of the note that were contained and expressed in said receipt of February 16th, 1885.

That the plaintiff never objected to the receipts so given by the defendant for the said years of 1880, 1881, 1882, 1883, and 1884, or notified this defendant that she claimed that said Kneeland T. Adams was not authorized to make such terms.

And said defendant further says that when said note, given by the said Adams for a part of the premium due February 16th, 1885, became due payment thereof was demanded of said Adams and refused; that afterwards, on the 7th day of October, 1885, said Adams paid this defendant $110.00 on said note, but without any agreement for an extension of the time of payment of the remainder of said note, and after the payment of said sum of $110.00, and during said month of October, 1885, this defendant demanded of said Adams the payment of the remainder of said note, which was refused by said Adams, and the same has never been paid by him or anyone else.

And defendant denies that by the terms of said policy any agreement was made with the plaintiff. It avers that the entire contract of insurance contained therein is with the insured, Kneeland T. Adams, and that plaintiff's only connection with said policy is that by the agreement with the insured the loss is payable to her.

This defendant denies that the facts set forth in the declaration as to the premium due February 16th, 1885, make a full payment of such premium. It denies that the conditions of the receipt given when the note for a part of said premium was taken changed any part of the contract contained in said policy. The policy provides for the payment of the premium in cash only and at the time specified, and this defendant consented to defer such cash payment only as provided in the renewal receipt.

Defendant further avers that the portion of the premium due in 1885, paid by said Kneeland T. Adams, was not sufficient if applied *pro rata* to carry the insurance to the date of his death, and that at time of such death defendant had no money in its hands which equitably applied could keep alive such insurance.

McMASTER & BOICE,
Attorneys for Defendant.

(R. pp. 7–9.)

The defendant in error (plaintiff below) demurred to this answer for want of facts to constitute a defense.

(R. p. 9.)

This demurrer was sustained by the court below, to which ruling, the plaintiff in error then excepted.

(R p. 9.)

This ruling of the Circuit Court is the subject of the second assignment of error in this Court. (R. p. 12.)

Afterwards, on December 6th, 1886, the said Michigan Mutual Life Insurance Company declining to amend its answer and electing to stand thereon and upon its exceptions to the rulings of the said Circuit Court, said Court thereupon found that there was due said Elizabeth B. Adams, on said policy the sum of $10,324.15 and then rendered judgment in her favor against said company for said sum of $10,324.15 and costs.

To this finding and judgment said company then objected and excepted. (R. pp. 9–10.)

This action of the Circuit Court is the subject of the third and last assignment of error herein. (R. p. 12.)

The steps necessary to transfer said cause to this Court were immediately taken. (R. pp. 10–12.)

ASSIGNMENT OF ERRORS.

The following errors are assigned in this Court, to-wit:

1. The said Circuit Court erred in said cause in overruling the demurrer of said Michigan Mutual Life Insurance Company to the declaration of said Elizabeth B. Adams.

2. The said Circuit Court erred in said cause in sustaining the demurrer of said Elizabeth B. Adams to the answer of said Michigan Mutual Life Insurance Company.

3. The finding and judgment of said Circuit Court in favor of said Elizabeth B. Adams and against said Michigan Mutual Life Insurance Company in said cause are erroneous and contrary to law. (R. p. 12.)

ARGUMENT.

Before entering upon the discussion of the particular questions presented by the record, we wish to say generally that they are by no means measured by the amount involved herein, but are of great importance and far reaching in their consequences, not only to the business interests of the plaintiff in error, but also to its policy holders. For if it cannot safely rely upon such contracts as that involved in this case, it will have to change its methods of doing business and require its policy holders to pay their premiums *in cash when due.* This would be a great hardship to many of them and would result in greater loss to them, than to uphold and enforce contracts like the one in this case. The multitude of cases benefitted by such indulgences do not appear in the Courts, but only those in which the parties receiving the indulgences have failed to comply with the conditions upon which they were granted, or in which there is a dispute upon this point.

We shall consider the questions presented by the record, in the order of the assignment of errors in this Court. For convenience and to prevent any confusion of the parties—their relations in this Court being just the reverse of what they were in the Circuit Court—we shall generally refer to the plaintiff in error, as, the Company, and the defendant in error, as, Mrs. Adams.

I.

FIRST ASSIGNMENT OF ERROR.

This brings in review the action of the Circuit Court in overruling the company's demurrer to the declaration.

(R. p. 12, *ante* p. 13.)

Before discussing the main questions, we wish to dispose of a preliminary question of pleading which may

have some bearing upon the main questions. The Civil Code of Indiana provides:

"When any pleading is founded on a written instrument or on account, the original or copy thereof, must be filed with the pleading. A set-off or counterclaim is within the meaning of this section. Such copy of a written instrument, when not copied in the pleading, shall be taken as part of the record." (Sec. 362 R. S. Ind. 1881.)

This section applies to suits on policies of insurance, and the original or a copy thereof must be filed with the declaration or it would be bad on demurrer for such defect.

Indiana Insurance Co. v. *Hartwell*, 100 Ind., 566. The defendant in error recognized this rule as applicable to this case by filing with her declaration, a copy of the policy sued on.

The Supreme Court of Indiana has also decided that where there is a conflict between an allegation of a pleading and the recitals of an exhibit properly filed therewith, the recitals of the exhibit *must control.*

Glenn v. *Porter*, 72 Ind. 525.

It will be observed that there is a conflict between the allegations of the declaration and the agreement recited in the policy, in this: The declaration alleges, "and plaintiff says that said policy of insurance also contained the further agreement with plaintiff that said policy might be renewed by the payment, on or before the 16th day of February in each year, of a stipulated sum, etc." (R. p. 1, *ante* p. 2.)

The policy reads: "And the said company do further promise and agree to and with the *insured* that this policy of insurance may be renewed by the payment, on or before the 16th day of February of each year, of the stipulated premium, etc." (R. p. 4, *ante* p. 6.)

This recital of the policy controls the allegation of

the declaration; and in considering the sufficiency of the declaration on demurrer said allegation must be regarded as if it read thus: "And the plaintiff says that said policy of insurance also contained the agreement with the insured, Kneeland T. Adams, that said policy might be renewed, etc." The agreement in the policy for renewal is with Kneeland T. Adams, and not with Mrs. Adams.

We now come to the main question:

Did the Circuit Court err in overruling the demurrer to the declaration?

The proper solution of this question depends upon the validity of the agreement for the renewal of the policy in suit, entered into between the insured, Kneeland T. Adams, and the company, on the 16th day of February, 1885, and expressed in the renewal receipt then given by the company to said Adams.

The declaration states the transaction on said 16th day of February, 1885, thus: "That the premium which fell due on the 16th day of February, 1885, being the sum of $259.10, was paid by the insured, Kneeland T. Adams, to the defendant, as follows: Cash in hand, the sum of $59.10; and for the balance, $200.00, said insured executed and delivered his note, payable four months after date, to the order of the defendant, and thereupon the defendant executed and delivered to the said Kneeland T. Adams a receipt for said premium, which is in the words and figures following, to-wit:

The Michigan Mutual Life Insurance Company.

$259.10. DETROIT MICH., Feb. 16, 1885.

Received two hundred and fifty-nine and 10-100 dollars being the annual premium due this day on policy No. 12,711, continuing the same in force until 12 o'clock noon of the 16th day of February, 1886, on the life of Kneeland T. Adams, of Indianapolis, Ind.: *Provided*,

that if any note or other obligation has been given for such premium or any part thereof and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same.

O. R. LOOKER, *Secretary.*"

If the condition upon which the company received said note, as expressed in said receipt is valid and binding, then the Circuit Court erred in overruling the demurrer; for the declaration further shows that said note was over-due and "not fully paid" when said Kneeland T. Adams died, December 17, 1885.

That contracts and conditions similar to that contained in said renewal receipt, and *even much less favorable* to the insured, have been upheld and enforced by this Court, and also by the Courts of last resort in many of the states, the following authorities abundantly show:

Knickerbocker Life Ins. Co. v. *Pendleton*, 112 U. S. 696;

Kleine v. *N. Y. Life Ins. Co.*, 104 U. S., 88;

Baker v. *Union Mutual Life Ins. Co.*, 43 N. Y., 284;

Williams v. *Albany City Ins. Co.*, 19 Mich., 451;

Wall v. *Home Ins. Co.*, 36 N. Y., 157;

Pitt, Adm'x v. *Berkshire Life Ins. Co.*, 100 Mass., 500;

Garlick v. *Mississippi Valley Ins. Co.*, 44 Ia., 553;

Shakey v. *Hawkeye Ins. Co.*, 44 Ia., 540;

Nedrow v. *Farmers' Ins. Co.*, 43 Ia., 24;

Gorton v. *Dodge County Mutual Ins. Co.*, 39 Wis., 121;

Watrous v. *Mississippi Valley Ins. Co.*, 35 Ia., 582;

Joliffe v. *Madison Mutual Ins. Co.*, 39 Wis., 111;

Patch v. *Phœnix Mutual Life Ins. Co.*, 44 Vt., 481;

Ferribee v. *N. C. Mutual Home Ins. Co.*, 68 N. C., 11;

American Ins. Co. v. *Henley*, 60 Ind., 515;

American Ins. Co. v. *Leonard*, 80 Ind., 272;

These two Indiana cases were approved in

Leonard v. *American Ins. Co.*, 97 Ind., 301;

Willcuts v. *N. W. Mutual Life Ins. Co.*, 81 Ind., 300;

Southern Mutual Ins. Co. v. *Taylor*, 33 Gratt., (Va.) 743.

To avoid the conclusion of these cases, counsel for Mrs. Adams, claimed in the Circuit Court, that said Kneeland T. Adams had no power or authority to enter into the contract expressed in said renewal receipt and that she was not bound thereby, and the Circuit Court so held.

We maintain that the contract expressed in said renewal receipt was and is valid and binding upon said Kneeland T. Adams, upon Mrs. Adams, and all others conditionally interested in said policy, upon one or more of the following grounds:

1. That Kneeland T. Adams, the insured, was the principal in the contract for renewal contained in the policy, and had the absolute right to make the contract he did for its renewal.

2. The declaration shows that said Kneeland T. Adams was authorized to make the contract he did, for the renewal of said policy, even if he was acting as the agent of Mrs. Adams.

3. That Mrs. Adams cannot claim under the contract of renewal made by said Kneeland T. Adams, in part and reject it in part. She must claim under it as a whole, or reject it as a whole, if she has the right to reject it at all. If she ratifies that which favors her, she ratifies the whole.

As to the first proposition, we think it manifest from the terms of the policy itself, that Kneeland T. Adams, the insured, was the principal in the contract, so far as its inception and continuance are concerned. And if so, the policy must, as we have shown, control any inconsistent allegations in the declaration.

The principal points in the policy are as follows:

1. It is a renewable term policy without participation in the profits of the company, and has no surrender value. There is an absolute insurance for one year, and a right to reinsure on paying each year thereafter, on the 16th day of February, a certain gradually increasing sum, after the second year, as shown on the back of the policy, until the age of 70 years. In these respects it differs from most life policies and is more like fire policies.

There is no provision for payment of premium by note, or otherwise than in cash. The rate per thousand of insurance is much less than in ordinary life policies.

2. It insures the life of said Kneeland T. Adams, and shows the first premium to have been paid by him.

3. The policy is payable as follows: (1), To Mrs. Adams, if living; (2), it not living, to the children of herself and insured, if any surviving him; (3), to the executors, administrators or assigns of insured.

4. The agreement for its renewal is expressly made with the insured, Kneeland T. Adams.

5. "This policy is issued, and the same is *accepted by the insured* on the following conditions:" 1st. The usual conditions as to residence, travel and occupation of insured. 2d. If the several premiums in renewal of this policy shall not be paid on or before the time when due, then the company is not to be liable to pay the sum insured or any part thereof and the policy is to cease and determine.

This shows that the policy was issued to and accepted by the insured, Kneeland T. Adams, and every covenant and agreement in it is with him. Mrs. Adams is simply the first of three *conditional* beneficiaries. She had no absolute right under said policy on the 16th day of February, 1885, and no human tribunal or wisdom could then have said that she would ever be entitled to receive a dollar on said policy, even if the premium had then been paid in full, in cash.

Upon what principle of law or reason can it be said, under such circumstances, that she was the principal in the contract and the only one authorized to make an agreement for its renewal? Suppose she had made the agreement in question, and then have died before her husband, could not their children, or his personal representatives, have said with much greater force, that she had no authority to bind them? Who then is to make the agreement for renewal when cash is not paid? It seems to us that both reason and the law say, that the person with whom the covenant in the policy for its renewal is made, is the principal in the contract, and primarily, is the proper person to make the agreement for renewal and that when he does make it, all others are bound by it.

As an authority upon this point we refer to *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y., 284. The Court, at page 287, said: "In this case the husband agreed for the insurance, and caused his wife to be named as the beneficiary in the policy. *It was, nevertheless, a contract with the husband, and the terms and conditions to which he assented attach to and qualify the policy, and determine the liability of the insurers.*" This was a stronger application of the doctrine, than we claim in the case at bar, in this; that in that case, the wife was the absolute and unconditional beneficiary, whereas in the case at bar, Mrs. Adams was only the first of three conditional beneficiaries.

The contract of renewal made by Kneeland T. Adams, on the 16th day of Februrry, 1885, violated none of Mrs. Adams' vested rights under said policy, because she had no rights thereunder after noon of said day, unless it was the right of renewal, and of this, if it existed, she did not avail herself. No case is stated, of an offer on her part to comply with the provisions of the policy as to renewal and the rejection of such offer by the company.

We grant that when the premium is paid for a given year in cash on such a policy, that the wife's rights are fixed for such period subject only to be defeated by her death before the husband, and that he and the company could not change the policy during such year by introducing a new beneficiary, or by surrendering such policy as a consideration for a new one, or by doing anything which would interfere with her vested rights for such period without her consent. But nothing of the kind was done or attempted in this case.

The contract of insurance is one sided when it comes to renewal. The company cannot demand that it shall be renewed and the insured can allow it to lapse by limitation in defiance of the company. The case at bar stood thus, on February 16, 1885: There was no covenant on the part of Kneeland T. Adams, or anyone else, to pay the premium. He was under no legal obligation to either the company or his wife to pay the premium, and he could allow the policy to lapse by nonpayment of it, without regard to the wishes of the company, and without regard to the wishes of Mrs. Adams; and the company was under no obligation to receive anything but cash. The time for which the insurance had been paid had expired; Adams did not pay the money; nor did Mrs. Adams pay the same; nor did she make arrangement for its payment; therefore he and the company stood facing each other without any obli-

gation to any one, resting upon either, when it came to negotiate for other than a cash method of payment. The authorities already cited show that, in insurance contracts, *time* is of the *very essence of the contract*. So, if the company consented to an extension of the time of payment of the premium, or any part of it, which fell due, February 16th, 1885, it had the right to impose any reasonable and legal terms and conditions, as to prompt payment at the expiration of the extension. The terms agreed upon between said Adams and the company for an extension of the time of payment of a part of the premium which fell due February 16th, 1885, as set forth in the declaration, were such as this and other Courts have repeatedly declared to be fair and reasonable; and such as the company had a right to exact. They violated none of Mrs. Adams' vested rights. The policy ceased to be a binding obligation at that time, if the premium was not paid; it had no surrender value and was absolutely worthless unless it was renewed. If nothing was done to renew the policy, she had no rights under it. Under the terms and conditions agreed upon between Adams and the company for its renewal there was no attempt to designate a new beneficiary or to change the title to the policy in any way. It was left subject to the contingency of being rendered valueless by Adams' non-payment, *a condition which had always attended it*.

AGENCY.

We now come to the second proposition, namely: *That the declaration shows that said Kneeland T. Adams was authorized to make the contract he did, for the renewal of said policy, even if he was acting as the agent of Mrs. Adams.*

The declaration does not aver that Mrs. Adams personally paid the premium at the time the same be-

came due, or caused it to be paid; or that she made any arrangement for the extension of the time of its payment; nor is it alleged, that she authorized or instructed anyone to do so for her. On the contrary she avers, "*that her said husband, Kneeland T. Adams, personally attended to all matters pertaining to said insurance policy and the payment of the premiums thereon.*"

If, then, Kneeland T. Adams is to be regarded as the agent of his wife, under this allegation, he was her general agent for the renewal of said policy, for it shows that the whole matter was left in his hands without any instructions as to the mode of renewal, and without any limitations of any kind upon his authority to renew it. This, *at least*, gave him the right to agree to any usual terms, for the renewal of said policy, and the authorities before cited, show that the terms agreed to by him, were usual terms where time is given for payment of the premium, or any part of it. The authorities, however, go farther than this, and say that such agent may use unusual means to accomplish the object of the agency.

Story on Agency, Secs, 17, 58, 60;
Trainer v. *Morison*, 78 Me., 160;
Wharton on Agency, Secs, 117, 118;
Cruzan v. *Smith*, 41 Ind., 288, at page 297.

"Where a wife is in the habit of leaving all business affairs to her husband, who without her knowledge, insures his life for her benefit, and keeps possession of the policy, and pays all premiums himself until the policy is *fully* paid up, without action or interference on her part, and, after the policy is paid up, the insurance company becomes financially embarrassed, he has implied authority to bind her by an agreement in her name, to a reduction of the amount of the insurance."

Singer v. *Charter Oak Ins. Co.*, 22 Fed. Rep., 774.

The husband in said case agreed that the policy should be scaled to three fifths of its face value, and this agreement was upheld.

"The authority of an agent being limited to a particular business does not make it special. It may be as general in regard to that as if the range of it was unlimited." *Anderson* v. *Coonley*, 21 Wend., 279. This doctrine is approved by the Supreme Court of Indiana, in *Cruzan* v. *Smith*, 41 Ind., 297, and on page 298 it is further said:

"The rule is stated in 2 Kent Com., 620, thus: The acts of a general agent, or *one whom a man puts in his place to transact all his business of a particular kind*, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; and the rule is necessary, to prevent fraud and encourage confidence in dealing." The distinction between a general and special agent is very clearly and accurately stated in this case, at page 297.

In *Toledo, W. & W. R. W. Co.* v. *Owen*, 43 Ind., 405, at page 408, it is said: "A general agent is one authorized to transact all of his principal's business, or *all of his principal's business of some particular kind*. A special agent is one who is authorized to do one or more special things, and is usually confined to one or more particular transactions, such as the sale of a tract of land, to settle and adjust a certain account, or the like. That *the authority of an agent is limited to a particular kind of business does not make him a special agent*."

Mr. Wharton, in his work on agency, says: "*A general agent* is one who is authorized by his principal to take charge of his business in a particular line." Sec. 117.

In Sec. 118, he further says: "*A special agent* is one authorized simply to do a particular insulated act."

In *Andrews* v. *Kneeland*, 6 Cowen, at page 357, it is said: "But where the agent is not limited as to the manner of doing a particular act, the principal may be

bound by his acts, though exceeding the authority intended to be given him." At page 359 it is further said: "His employment was a general one. There was no restriction as to the mode of sale, whether by sample or otherwise. He had authority to sell as cotton was sold in due course of business. It appears that the most usual sales of cotton were by inspecting the bulk; but that it was unusual to sell by sample. The broker, no doubt, however, had authority to sell by sample, if he thought proper; and as a sale by sample is of itself a warranty that the bulk corresponds to the sample, he was authorized by virtue of his employment, unrestricted in the mode to be adopted by him, to bind his principal by such sale."

In the recent case of *Trainer* v. *Morison*, 78 Me., at page 163, the rule as to general agency is stated thus: "*Persons dealing with an agent have a right to presume that his agency is general and not limited, and notice of the limited authority must be brought to their knowledge before they are to regard it.*" See also, *Methuen Co.* v. *Hayes*, 33 Me., 169.

There is no allegation or suggestion in the declaration, that Mrs. Adams ever notified the company, that there was, or that she claimed that there was, any limitation on the authority of Kneeland T. Adams, to renew said policy as he saw fit. This brings the case at bar clearly within the rule above stated.

So we say, that if Adams was acting as agent of his wife, the above authorities clearly show that he was *her general agent*, and the company had the right to presume, under the circumstances, that he was vested with full authority to enter into the contract of renewal which he did; and that Mrs. Adams cannot now be heard to question it.

RATIFICATION.

The chief contention of counsel for Mrs. Adams, in the Circuit Court, was that she was the principal in the

contract, contained in the policy and that Kneeland T. Adams, as her agent, made an unauthorized change therein by said contract of renewal, and that she had the right to ratify so much of said contract of renewal as was favorable to her and reject all that was unfavorable. In other words that she had the right to ratify so much of said renewal contract as to renew the policy and reject the conditions upon which it was renewed.

This, we respectfully submit, is not the true rule of ratification applicable to this case; on the contrary, the true rule is as stated in our third proposition:

That Mrs. Adams can not claim under the contract of renewal made by said Kneeland T. Adams, in part and reject it in part. She must claim under it as a whole, or reject it as a whole, if she has a right to reject it at all. If she ratifies that which favors her, she ratifies the whole.

This is the doctrine of ratification laid down by this Court.

In *Gaines* v. *Miller*, 111 U. S., at page 398, it is said: "If a principal ratifies that which favors him, he ratifies the whole."

In *Shoninger* v. *Peabody*, 17 At. Rep. 278, at page 279, it is said: "that the existence of the contract could not be affirmed to promote the purpose of a recovery, and at the same time be treated as a nullity in order *to shut out the opposite party from a defense otherwise open to him.*"

In *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y., at page 288, it is said: "The case will not be changed, if the policy is regarded as having been procured by the plaintiff, and as the result of an agreement made between her and the defendant. The husband of the plaintiff was the actor in the transaction, and represented the plaintiff; and, claiming the benefit of his acts, and of the policy procured by his agency, she nec-

essarily ratifies and affirms the contract as it was made, with all its terms and conditions. She adopts the acts of the agent, and makes them her own. * * * If the agent exceeds or transgresses his authority, the principal may repudiate his acts altogether, *but he cannot affirm in part and repudiate in part: take the benefit of the favorable parts of a contract, and reject the residue.*"

In *Benedict* v. *Smith*, 10 Paige, 126 at page 130, it is said: "But where one person assumes to act as the agent of another, without authority, the person for whom he assumes to act cannot claim the benefit of his agency in part only, and reject it as to the residue of the transaction." See also *Krider* v. *Trustees etc.*, 31 Ia., 547, 550.

In *Farmer's L. & T. Co.* v. *Walworth*, 1 N. Y., 433, at page 447, it is said: "It would be strange indeed, if the law would permit them to have the second mortgage, to which they had no title whatever except by affirming the act of the clerk, and yet allow them to reject that part of his act which induced the giving of that mortgage."

This in principle, is what the Circuit Court did in the case at bar. It allowed Mrs. Adams to affirm the contract of renewal made by her husband, and at the same time to reject the conditions in the contract, which alone induced the Company to make it.

And it seems to us, that Mrs. Adams' counsel will, of necessity, be compelled to contend in this Court that the husband had the right not only to make the contract for the giving of the note for the premium, but also that such note was an absolute payment, whether ever paid or not, though the receipt given as part of the transaction expressly provides that it shall not be.

This we most respectfully submit, the law will not allow to be done.

The reasoning in *Whitehead* v. *N. Y. Life Ins. Co.*,

102 N. Y., 150, on a similar point is applicable here. At page 155 it is said: "It is obvious, also, that if in any sense, the insurer can be said to have recognized the policy as a valid and subsisting obligation, it was a conditional and not an absolute recognition." * * * "and the plaintiffs cannot avail themselves of the waiver which their agent secured, and repudiate the terms and conditions upon which alone he secured it." This case also affirms *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y., 283, upon this point.

See also *McClure Bros.* v. *Briggs*, 58 Vt., 82; *Billings* v. *Mason*, 15 Atl. Rep. 59; *Widner* v. *Lane*, 14 Mich., 124, 134; *Peninsular Bank* v. *Hanmer*, 14 Mich., 208, 214.

In *Leake* v. *Ball*, 116 Ind., 214, at page 216, it is said: "*A contract cannot be affirmed in part and rejected in part; it must be totally repudiated or not repudiated at all.*"

We further say that if Kneeland T. Adams was the agent of his wife to make the renewal, he was also her agent to know what the contract was that he made, and she cannot enlarge her rights by saying that she had no actual knowledge of it.

In *Tasker* v. *Ins Co.*, 59 N. H., at page 445, it is said: "The plaintiff cannot avoid the limitation on the ground that he had no knowledge of it, and his agent was not authorized to assent to it. If the contract on which the suit is brought was ever made by anybody, it was made on the part of the plaintiff, by Robinson as his agent. * * * And whether the plaintiff claims the contract as his by previous authorization or subsequent ratification, is immaterial. * * * *Robinson's authority to make the contract, as agent of the plaintiff, included authority to know what the contract was that he made.* * * * So the plaintiff, in this suit upon a written contract made in his behalf by his agent, is charged with his agent's knowledge of the contract. *The case*

is as if the plaintiff had written the contract himself. He cannot enforce stipulations favorable to himself, and reject the rest."

In *Branon* v. *May*, 42 Ind., 92, at page 99, it is said: "It is settled that if one assume to act as the agent of another, and cause an act to be done for him of which the latter afterward takes the benefit, he must take it charged with notice of such matters as appear to have been at the time within the knowledge and recollection of the agent."

PART PAYMENT NO WAIVER.

The acceptance of part payment of Adams' note did not constitute a waiver of the conditions in the renewal receipt.

Garlick v. *Mississippi Valley Ins. Co.*, 44 Ia., 553;
Nedrow v. *Farmers' Ins. Co.*, 43 Ia., 24;
Williams v. *City of Albany Ins. Co.*, 19 Mich., 451.

In the latter case the note was paid in full after the loss, and it was held not be a waiver.

The contracts in these cases are the same in legal effect, as that in the case at bar.

PAYMENT OF PART OF PREMIUM NO RENEWAL.

The payment of part of the premium due February 16th, 1885, in cash, did not renew the policy, as the contract is entire.

Willcuts v. *N. W. Mutual Life Ins. Co.*, 81 Ind., 300.

WANT OF KNOWLEDGE OF NOTE AND RECEIPT NO EXCUSE FOR NON-PAYMENT.

That Mrs. Adams had no knowledge of the note, or of the conditions upon which it was given, as alleged in her declaration, is no excuse for the non-payment thereof, and does not enlarge her rights.

Kleine v. *N. Y. Life Ins. Co.*, 104 U. S., 88, 92;
Baker v. *Union Mutual Life Ins. Co.*, 43 N. Y., 284.

In the first named case the contract purported to be with the wife, while in the second case, it was with the husband.

See also, *Carpenter* v. *Central Life Association*, 68 Ia. 453;
Tasker v. *Ins. Co.*, 59 N. H., at page 445.

CONTRACT OF RENEWAL NO CHANGE IN POLICY.

The contract of renewal made by Kneeland T. Adams, on February 16th, 1885, did not change the contract in the policy, but simply continued it in force on *certain conditions*, after the right to keep it in force at all, had ceased because of non-payment. It was a waiver of strict performance based upon a condition, and not a change. All rights under the policy had terminated when the contract of renewal took effect.

Trustees of First Baptist Church v. *Brooklyn Fire Ins. Co.*, 19 N. Y., 305.

This action was upon a fire policy for $5,000. The policy was originally for one year, and contained a provision that it might be continued for such further term as might be agreed upon "provided the premium therefor is paid and indorsed on this policy or a receipt given for the same:" and that "no insurance whether original or continued shall be considered as binding until the actual payment of the premium."

The plaintiff offered to prove that while the original policy was running, a verbal agreement was made between the plaintiff and the defendant that until notice to the contrary should be given by one party to the other, the defendant should renew the policy from year to year without further notice, and give a certificate of renewal and that the plaintiff should pay the premium

therefor on demand; and that defendant renewed said policy in 1846 and 1847 in pursuance of said agreement. This was ruled out in the court below.

It was claimed on appeal that said evidence was inadmissible on the ground that it changed and contradicted the terms of the policy. In regard to this claim the Court said, at page 312: "In any subsequent agreement for a renewal or continuation of the risk, it was competent for the parties to contract by parol and to waive the payment in cash of the premium, substituting therefor a promise to pay on demand or at a future day. Proof of such an agreement would have no tendency to contradict or to change the written policy already in force between the parties, and which would be wholly spent before the new agreement could take its place. This is too plain to require further elucidation."

The contract in the case at bar, was not a harsh one. It said to the insured, that although he failed to pay his premium when due, the company would carry the risk four months longer, upon the faith that he would pay his note due at the end of that time; but that if he made default in such payment, then for the time he was in default the risk should be suspended. Payment would have restored the policy, at any time after the default and before the loss; but such payment was not made. There was no cast of management of any kind on the part of the company to avoid the liability. The failure was wholly on the other side; and we submit that the demurrer to the declaration should be sustained.

II.

SECOND ASSIGNMENT OF ERROR.

This brings in review the action of the Circuit Court in sustaining Mrs. Adams' demurrer to the company's answer. (R. p. 12, *ante*, p. 13.)

The Judge in the Circuit Court at the time he sustained the demurrer to the answer, stated orally that he did not consider that it stated any new facts changing the legal phase of the case made by the declaration. This may be true, if he rejected all the broad conclusions claimed by the pleader in the declaration and took all its allegations most strongly against her. It is true that under the practice in Indiana, a demurrer only admits the truth of *such facts* as are well pleaded and does not admit any conclusions of law, or mere conclusions of the pleader, stated in the pleading, but we did not consider it entirely safe to allow the case to stand upon the facts as stated in the declaration, although we most sincerely think as stated in our argument of the demurrer thereto, that it does not state facts sufficient to constitute a cause of action. Still the declaration does not state fully all the facts connected with the policy and we thought it safe and proper to give a more particular and detailed statement of them. Especially so in view of the theory upon which the Circuit Court decided the case, namely: That Mrs. Adams was the principal in the contract and that Kneeland T. Adams acted as her agent in making said contract of renewal and exceeded his authority in doing so, and that she had a right to ratify so much of the contract as to renew the policy and reject the conditions upon which it was renewed. Upon this theory of the case, we think the answer states new facts which may materially change the legal aspect of the case, and that they do so change it, unless, this Court disagrees with the Circuit Court as to the law applicable to the facts stated in the declaration.

We wish the Court to consider as applicable to this assignment of error, our argument in support of the demurrer to the declaration without repeating it here.

The same questions arise under this assignment of error as under the first, except in slightly different form.

We shall here recall the principal points in the answer and point out some of the particulars in which we think it more specific than the declaration, and also state some further reasons why we think the Circuit Court erred, in sustaining the demurrer thereto.

First it admits the execution of the policy sued on and the death of the insured, Kneeland T. Adams.

In most particulars, of course, the policy speaks for itself and is to be construed by this Court, but it differs from most policies in this, that it is what is technically called a "renewable term policy." We aver specifically what such terms mean in the business of life insurance, to-wit: "That said meaning is that each year's insurance is dependent of other years; that the premium of each year is to pay for the risk of that year, and is fully consumed, earned and exhausted at the end of that year and that such policy is without surrender value." This allegation shows that if the policy was not renewed it was absolutely worthless, and that neither Mrs. Adams, nor anyone else, had any vested rights under said policy after noon of February 16, 1885, unless it was renewed. Ordinary life policies provide for a paid up policy or a surrender value, after default in payment of premium, and in such case she would have had at least, a contingent vested right, after default, but no such right existed in this case if the policy was not renewed. The answer next alleges that when the premium became due, on the 16th day of February, 1885, Mrs. Adams made no offer of any kind to pay the same to the company or to any person for it, and furnished no means to Kneeland T. Adams to make such payment, and gave him no instructions whatever, in regard to its payment or the renewal of said policy.

This shows that Mrs. Adams did nothing whatever, toward the payment of the premium then due or the renewal of said policy at that time. If she was the

only one who could make an agreement for its renewal as claimed by her counsel, then the policy ceased at that time and all her rights under the same were then terminated, for she did nothing and authorized nothing to be done to keep them alive. Bearing these facts in mind, we are now prepared to view in its true light the action of Kneeland T. Adams.

His acts in relation to the policy and this transaction are set forth in the answer as follows:

"And defendant says that Kneeland T. Adams, when said premium on said policy became due, on the 16th day of February, 1885, said and represented to said defendant that he could not pay the said premium in money, but that he would pay the sum of $59.10 in cash and execute his note at four months for $200.00, said Adams being then fifty-five years old and said premium for that year being the sum of $259.10; that the company then consented and agreed to receive said cash payment and said note upon the terms and conditions set forth in the receipt set out in the plaintiff's declaration and not otherwise.

And defendant further says that said Kneeland T. Adams personally attended to all matters pertaining to said policy of insurance and the payment of the premiums thereon from the time said policy was issued in 1877; and that the plaintiff never claimed the right to pay the premiums on said policy or to make arrangements for its renewal, or that she had a right to say upon what terms it should be renewed, but left the whole mattter to said Kneeland T. Adams without instructions or directions of any kind and without giving any notice of any kind to this defendant that said Adams was not fully empowered to make any arrangements for the renewal of said policy that he saw fit; nor did said plaintiff ever give to this defendant any notice that she claimed that said Kneeland T. Adams did not have such right.

That when the premium for the years of 1880, 1881, 1882, 1883 and 1884, respectively, became due, said Kneeland T. Adams was unable to pay the same in money and gave his note for the greater portion of each of said premiums, and in each instance such note was received by the defendant upon the same conditions upon which the note of February 16th, 1885, was received, and in each instance a receipt was given by the said company to said Adams containing and expressing the same conditions as to payment of the note that were contained and expressed in said receipt of February 16, 1885.

That the plaintiff never objected to the receipts so given by the defendant for the said years of 1880, 1881, 1882, 1883 and 1884, or notified this defendant that she claimed that said Kneeland T. Adams was not authorized to make such terms."

What are the inferences from these facts, even upon the theory that Kneeland T. Adams was acting as the agent of his wife? Was there ever a case in which the principal more completely, unreservedly and entirely entrusted a particular branch of business to his or her agent, than is here shown? From *its inception to its end*, it is absolutely in the hands of the agent without any directions or instructions as to how it shall be conducted, and without any limitation whatever upon his authority or discretion as to the manner of conducting it. It is not the case of a single and isolated transaction as were the cases cited by counsel for Mrs. Adams in the Circuit Court, and to which we shall more particularly refer hereafter, but it shows a course of dealing with such agent through a series of years, and in a *uniform manner*, without any objection of any kind from the principal. Under such circumstances the company had the right to presume that Adams was fully authorized and empowered to enter into the contract he did.

If Mrs. Adams was the principal, then the law conclusively presumes that she had full knowledge of how the business was conducted, for the knowledge of her agent is imputed to her.

Brannon v. *May*, 42 Ind., 92, at pp. 99 to 101;
Tasker v. *Ins. Co.*, 59 N. H., at page 445;
Harrington v. *U. S.*, 11 Wall., 356, 367.

The rule is clearly stated in Wharton on Agency, Sec. 177. He says: "He who avails himself of the services of an agent must take these services burdened by any equities that he would have been individually subjected to, had he transacted the particular business in person. That which would have been notice to him, dealing with the matter personally, is notice to him when dealing through an agent." After speaking of the injustices which must follow any other rule, he further says: "The only way of avoiding such perversions of justice, is by holding that the principal is to be bound by all notices coming to his agent, when such notices would have bound him, if given directly to himself."

In *Baker* v. *Union Mutual Life Ins. Co.*, 43 N. Y., at page 289, upon a point like that under discussion, it is said: "The payment of the premium by note, with conditions affecting the policy, instead of in cash, was the act of the plaintiff's agent, and as the principal is chargeable with knowledge of the act of the agent, and notice to the agent is notice to the principal, it follows that the defendants are not estopped from alleging the truth of the transaction as against the plaintiff."

Mrs. Adams could not abandon the whole business to her husband, shutting her eyes to all that he did, and now be heard to say that she did not authorize this or that particular act. If she was principal, it was gross negligence on her part to wait ten months, and until after her husband was dead, without making any any inquiry as to the renewal or the terms thereof, and

the law will charge her with the knowledge which she might have had by reasonable diligence.

The answer next avers: "And said defendant further says that when said note, given by said Adams for a part of the premium due February 16th, 1885, became due, payment thereof was demanded of said Adams and refused; and that afterwards on the 7th day of October, 1885, said Adams paid the defendant $110 on said note, but without any agreement for an extension of the time of payment of the remainder of said note, and after the payment of said sum of $110, and during said month of October, 1885, this defendant demanded of said Adams the payment of the remainder of said note, which was refused by said Adams, and the same has never been paid by him or anyone else."

These allegations show that the conditions in the renewal receipt relieving the company from liability attached at the maturity of said note, and that they so continued in force until after the death of Adams. The receipt of $110 on said note October 7, 1885, without an extension of the time of payment of the remainder, was no waiver of the conditions of the receipt.

Garlick v. *Mississippi Valley Ins. Co.*, 44 Ia., 553;
Nedrow v. *Farmers' Ins. Co.*, 43 Ia., 23;
Williams v. *City of Albany Ins. Co.*, 19 Mich, 451.

The unsuccessful demand of payment of the remainder of said note was no waiver of the conditions in the receipt.

Baker v. *Union Mutual Life Ins. Co.*, 43 N. Y., at page 290.

The answer next denies certain broad conclusions stated in the declaration; and then closes as follows:

"Defendant further avers that the portion of the premium due in 1885, paid by said Kneeland T. Adams, was not sufficient if applied *pro rata* to carry the insur-

ance to the date of his death, and that at the time of such death defendant had no money in its hands which equitably applied, could keep alive said insurance."

Under the law as declared in *Willcuts* v. *N. W. Mutual Life Ins. Co.*, 81 Ind., 300, Mrs. Adams was not entitled to have the money paid by said Kneeland T. Adams applied *pro rata* to keep alive said insurance; but if we should concede that she was entitled to have it so applied, the answer shows that it was not sufficient if so applied to carry said insurance to the date of his death, and that the company had no money in its hands which equitably applied, could keep alive said insurance. If all the money paid was treated as paid on February 16th, 1885, and applied *pro rata* to keep alive said insurance, it would only have carried it to October 12th, 1885. It would have been exhausted more than two months before the death of said Adams. So the answer shows that there were no equitable grounds upon which said policy could be treated as in force at the time of his death.

We respectfully submit, that the facts stated in the answer, show that Kneeland T. Adams was fully authorized to make the contract of renewal which he did, whether he acted as principal or as agent, in the transaction.

But we claim here, in the first instance, as in our argument on the demurrer to the declaration, that a fair construction of the contract in the policy makes said Adams the proper person to contract for its renewal. It was his contract for his wife's benefit, if she survived him. She was a mere volunteer. She paid nothing for the policy, and parted with nothing of value for its renewal; and it is now too late for her to say that she is the principal in the contract, and that her husband was wholly unauthorized to make the contract that he did

for its renewal, and that she will only ratify the favorable parts of said contract and reject the residue.

It was a contract not only about him, but with him.

REVIEW OF AUTHORITIES CITED BY MRS. ADAMS.

It was contended by counsel for Mrs. Adams, in the Circuit Court that the retention of the note by the company, was a waiver of the condition in the renewal receipt, and they cited in support of their claim,

Insurance Co. v. *French*, 30 O. St., 240.

The facts in the Ohio case are not analogous to those in the case at bar. In the Ohio case the renewal receipt was absolute, and the check given for part of the premium was without condition. There was no provision in the renewal receipt that; "the whole amount of the premium included in such note or other obligation shall be considered as earned and the company may collect the same."

In the case at bar the renewal receipt expressly provides: "*that if any note or other obligation has been given for such premium or any part thereof and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same.*"

These provisions, which are wholly absent in the Ohio case, present the vital questions in this case, and it cannot be fairly said, that a decision made upon an entirely different state of facts can be considered as an authority against the company in this case. Besides it will be observed, that the Ohio case recognizes the right of the husband to make a valid agreement, that the policy should be forfeited for the non-payment of a note given for a part of the premium, but decided that upon

the facts in that case, the company had waived the forfeiture. That case really turned upon a question which was submitted to the jury. It is also expressly stated in the opinion, at page 253, that: "French offered to give up his policy if the company would return his check and note. This was refused."

There was no such offer and refusal in this case, and if there had been the cases would not be analogous, for it is expressly provided in the renewal herein, that the part of the premium covered by the note should be considered as earned and that the company might collect the same. This is a very material provision in the contract, and clearly distinguishes it from the Ohio case, and the claim that the mere retention of the note was a waiver of the condition in the renewal releasing the company from liability for loss occurring during the non-payment after maturity.

This distinction is forcibly and clearly stated in the cases of *Gorton* v. *Dodge Co. Mutual Ins. Co.*, 39 Wis., 121; and *Joliffe* v. *Madison Mutual Ins. Co.*, 39 Wis., 111.

It was a case of suspended liability so long as Adams was in default. The contract gave the company the right to collect, and Adams the right to pay the note; and this could be done by installments. If the note had been fully paid during the then current year of the policy, and before the death of said Adams, its vitality would have been restored for the remainder of such year. Adams had the right to insist that the company should keep the note, that he might pay it and escape the effects of his default.

The contract was eminently fair. It left the fate of the policy entirely under the control of the insured, but it seems this fairness has been used to the prejudice of the company.

We again call attention to, 44 Ia., 553, 43 *id*, 24, and 19 Mich., 451, to the effect, that part payment did not waive the condition in the renewal.

We repeat, that there is no substantial difference between a fire policy for a term of years, and the one in suit. It is for a term of years and not for life. If Adams had lived to be over 70 years old it would have ceased by force of its own terms.

Counsel for Mrs. Adams cited *Thompson* v. *Ins. Co.*, 104 U. S., 252, in support of the doctrine of the Ohio case. It is evident this Court did not intend to approve the Ohio case, except as to the result upon the facts of that case as this Court understood them; for it is said at page 257: "But, in that case no provision was made in the policy for a forfeiture in case of the non-payment of a note given for the premium, and *an unconditional receipt* for the premium had been given when the note was taken; and this fact was especially adverted to by the Court." No unconditional receipt was given in the case at bar, but the receipt given contains an express condition relieving the company from all liability in case of non-payment of the note at maturity. This takes the case at bar out of any doctrine of the Ohio case approved by this Court in the Thompson case.

It certainly cannot be said that the Thompson case approves what is said in the Ohio case about notice, and the exercise of an option, by the company to work a forfeiture; for the Thompson case decides just the opposite on these points. It holds that no notice was necessary to work a forfeiture, and that the retention of the note was no waiver. The Ohio case seems to be out of line with all the cases in much of its reasoning.

The note was retained by the company in each case cited by us in support of the contract in the case at bar, and no notice was given to work a forfeiture in any of them. (See cases *ante* pp. 17, 18).

Counsel for Mrs. Adams also cited in the Circuit Court the following cases, to the effect, that her husband,

Kneeland T. Adams, could not change the contract in the policy without her consent, to-wit:

Harley v. *Heist*, 86 Ind., 196;
Pence v. *Makepeace*, 65 Ind., 345;
Stilwell v. *Mutual, etc. Co.*, 72 N. Y., 385;
Ricker v. *Charter Oak, etc. Co.*, 10 Ins. L. J., 14.

These are cases where the husband having paid the premium, and the policy being in life, attempted to surrender it, taking another as a substitute therefor, making the old policy, the consideration in whole or in part for the new, without the consent of the wife; or attempted to assign or otherwise dispose of it for his own benefit without such consent. All of them we believe, contain this principle in some shape, and the courts very properly decided that such transactions could not be upheld. The reason is manifestly, that the premiums having been paid for a definite period, she had vested rights for such period that could not be affected without her consent. It is an executed contract for the time the premium has been paid, and her rights are fixed for such time.

None of the cases hold, however, that the husband has no right to make a contract for the renewal of the policy, where time is given for payment of the premium, or a part thereof. Nor do any of the cases hold that the wife's right to the amount of the insurance, upon the death of her husband, may not be lost by his failure to pay the premium. Indeed they expressly recognize this contingency.

In the case of *Harley* v. *Heist*, *supra*, the Court quotes from Bliss on Life Insurance, as follows: "He is under no obligation to continue to pay the premiums, unless he has covenanted so to do, but if he does so, the person originally designated in the policy will derive the benefit."

The case of *Ricker* v. *Charter Oak, etc. Co. supra*,

was one in which the policy was paid up, and the husband attempted to change it and introduce a new beneficiary. The Court on page 145 says: "Upon the facts in the case at bar, however, the Court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance, still remains unpaid, and where the policy is liable to forfeiture in case of non-payment." This case has no analogy to the case at bar, and we ask a careful examination of the opinion.

The same is true of the case of *Stilwell* v. *Mutual Ins. Co.*, 72 N. Y., 385, at page 391, it is said: "I think, however, that the true relation between the parties, in respect to procuring the policy, was that of principal and agent. The husband surrendered a policy of another company belonging to his wife, and applied for and received this policy for her, and in her name, as her agent, and when it was delivered to him it was, in legal contemplation in her possession. As such agent he had no power to give it up, surrender it, or rescind it without her consent."

In the case at bar, none of these things was done or attempted to be done.

The contract of renewal herein violates none of Mrs. Adams' vested rights under said policy; for by its express terms, she had no such rights, after noon of February 16th, 1885, unless she claims under said contract of renewal. If she does that she must claim under it as it was made, with all its terms and conditions, for it was the only contract to which the company ever assented. The law cannot make a new and different contract for the parties. Where there is an express contract, there can be no implied one. It must be as made by the parties, or not at all.

Mutual Life Ins. Co. v. *Young*, 23 Wall., 85;
Billings v. *Mason*, 15 Atl. Rep., 59.

In support of the proposition, that Mrs. Adams may accept the note given by her husband as an absolute renewal of the policy sued on, for one year, and reject the conditions upon which said note was taken by the company as expressed in the renewal receipt, her counsel cited the following cases in the Circuit Court;

Smith v. *Tracy*, 36 N. Y., 79;
Condit v. *Baldwin*, 21 N. Y., 219;
Cooley v. *Perrine*, 41 N. J. L., 322;
Bryant v. *Moore*, 26 Me., 84;
Stilwell v. *Mutual Life Ins. Co.*, 72 N. Y., 385.

Before considering these cases in detail, we say generally that the facts in none of the cases cited by counsel in support of their position, are analogous to the case at bar; nor did the facts in any of those cases require the decision or application of any such doctrine as is now claimed for them, to properly decide them. They are all cases of *special agency with expressly limited powers.*

In *Stilwell* v. *Mutual Life Ins. Co.*, 72 N. Y., 385, the action was to restore a policy on the life of plaintiff's husband which had been surrendered by him without her knowledge or consent and without any authority from her so to do. We concede this is a strong case of non-ratification of the act of the agent, but the plaintiff was allowed to recover on the *sole* ground that she repudiated the *whole contract of surrender* and did not *receive any benefit* from it. This is a very different thing from accepting in part, and rejecting in part. It is just the contrary.

In *Condit* v. *Baldwin*, 21 N. Y., 219, the action was upon a note given by the defendant to the plaintiff for a loan of money, and the defense was usury. The plaintiff lived in New Jersey and sent her money to Smith, an attorney, at Newark, N. Y., to be loaned for her at lawful interest. The statement of facts is too long to

set out in full, but we ask the Court to carefully consider them as they clearly show that there is no analogy between it and the case at bar.

The note upon its face bore lawful interest, and the fact relied upon as showing usury was the payment of $25 to plaintiff's agent, as an attorney's fee, for his sole use and benefit, by the agent of the defendant, Baldwin, for making the loan to him, and which payment was made without the knowledge or consent of plaintiff. A majority of the Court held that plaintiff was not bound by this secret agreement as she received no benefit from it, on the ground that she had a right to presume that her agent would not violate the laws of New York.

In our judgment the principle of the above case is not correctly stated in *Smith* v. *Tracy*, 36 N. Y., 79, also, cited by Mrs. Adams. The only principle that can fairly be said to be decided by *Condit* v. *Baldwin*, is that a party, in the absence of instructions or knowledge to the contrary, has a right to presume that his agent has not violated the laws of the state or country, where he does business, and that by accepting a contract which upon its face appears to be in accordance with such laws does not thereby ratify an unknown and unauthorized violation of such laws, if he receives no benefit from such violation.

This principle has on application to the case at bar, and it seems to us, that it had no application to the case of *Smith* v. *Tracy*, *supra*.

We think the facts in the latter case are much more analogous to the case of *Bennett* v. *Judson*, 21 N. Y., 238, than to *Condit* v. *Baldwin*, *supra*, but however this may be considered by the Court, it is certain that the facts in *Smith* v. *Tracy* are not analogous to the facts in this case. In that case the action was for breach of an alleged warranty in the sale of certain bank stock. The Court at page 82 states the rule of law applicable to the

case thus: "An agent employed to sell, without an express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty. (1 Parsons on Contracts 5th Ed., 60.) It was proved that no such custom exists in connection with the sale of bank stocks, and that the *special agent*, in this instance, had nothing but a *naked* authority to sell."

The Court laid stress upon the fact that it was a case of *special agency* with *expressly limited powers*. In summing up the case the Court said: "*It was a single and isolated transaction, unaided by any extrinsic fact or any anticedent relation*; and upon its own merits, it must stand or fall. The sole authority of Hollister was to sell the stock at par, with interest from the date of the last dividend, and to insert the name of the purchaser in the blank, left in the body of the transfer written and signed by Mr. Tracy. *The representations to the plaintiff were not even made in the testator's name.*"

The whole facts clearly show that the representations made by Shearman & Hollister were made by them as officers of the bank, and not as the representatives of Tracy, and that they were made under such circumstances that Smith had no right to rely upon them as made on behalf of Tracy, and plainly he did not at the time. He made no inquiry as to what or whose stock he was buying and did not know what stock he had bought until after he had paid for it and received a certificate therefor from the bank. He was then told that it was part of Tracy's stock and that he had been induced to sell it by his embarrassment in connection with the Wabash Railroad Co. Shearman who made most of the representations, had no authority to represent Tracy in any way.

A proper decision of the case did not require the application or decision of any such doctrine as is now claimed for it by Mrs. Adams' counsel in this case.

In *Cooley* v. *Perrine*, 41 N. J. L., 322, the facts clearly show that Perrine had no right to rely upon any representations made by Woodward, the alleged agent. He knew Woodward had no original authority to sell and that he did not claim to have any, but simply went with Perrine to see Cooley, the owner of the horse, and when it was found that Cooley was too sick to see Perrine, Woodward simply acted as messenger to take Perrine's proposition to buy the horse to Cooley and to return Cooley's answer.

This was the substance of the transaction, and what is said about the right of a principal to ratify in part, and reject in part is purely *obiter*.

The case of *Bryant* v. *Moore*, 26 Me., 84, is a case of substantially the same character. The Court, at page 87, said: "After the first bargain the defendant was informed, that McAllister had acted without authority and of the terms, upon which the plaintiff would make the exchange; and he had no right to conclude that McAllister had any authority to vary them. There being no warranty in the first bargain, he could not be authorized to infer, that McAllister might make one as part of the second. On the contrary he should have been admonished by what had taken place, that he had no general authority to make an exchange."

Clearly this case lends no support to Mrs. Adams' claim herein.

The cases of *Wilson* v. *Tumman*, 6 Man. and Gr., 238, and *Bush* v. *Buckingham*, 2 Ventris, 83, cited in two of the New York cases, and also by counsel for Mrs. Adams, are not analogous to this case and in our judgment have no application to it.

Wilson v. *Tumman* was not an action on a contract but an action for trover or conversion. It was held in that case that the landlord was not liable in tro-

ver for the tort of a public officer committed without his knowledge and in violation of his express directions.

Bush v. *Buckingham* was a case of mistake of scrivner in drawing a bond to secure a loan of money by which it was made to bear illegal interest. It was a case in which equity would have reformed the contract to make it speak the truth and plaintiff was allowed to recover amount loaned with legal interest on showing the mistake. The questions involved in these cases were very different from the claim of counsel herein.

If they seek to apply the doctrine of these cases to an unrestricted authority to sell, then they are in conflict with the decisions of this Court.

In *Schurchardt* v. *Allen*, 1 Wall, 359, it is said: "Authority without restriction to an agent to sell, carries with it authority to warrant."

We think we have sufficiently shown that the cases cited by Mrs. Adams do not meet the case made by the company's answer, nor do they support the case made by the declaration. They are all cases of special agency with expressly limited powers, and were confined to a single transaction.

In the case at bar, the answer shows that for each of the five years immediately preceding, February 16th, 1885, the company made a similar agreement with said Kneeland T. Adams. The law conclusively presumes, that Mrs. Adams had full knowledge of these transactions, if she was the principal and he was acting as her agent, and as she never made any objection to them, she thereby impliedly, at least, gave authority to her husband to continue such arrangement, and is bound by it.

NO CONTRACT OF RENEWAL.

If the theory of counsel for Mrs. Adams, that she is the only person who could make the contract for renewal, and that the contract made by her husband was

wholly unauthorized by her, is correct, then, it is evident that no contract of renewal existed, during the life of her said husband.

The company never consented to any terms of renewal, other than those made with her said husband, and expressed in said renewal receipt; but as those terms, according to her claim, were wholly unauthorized by her, and were not known to her, nor consented to by her, during the life of her said husband, or since, they were never binding, either upon the company, or upon her. *Mutual Life Ins. Co.* v. *Young*, 23 Wall., 85, at page 107.

Consequently, there was never any meeting of minds upon any terms for the renewal of said policy, and it ceased to exist at noon of February 16th, 1885.

In *Mutual Life Ins. Co.* v. *Young*, at page 107, this Court said: "The applicant assented to the proposition contained in the receipt, but the company did not. The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none."

Near the close of the opinion, it is further said: "Even where the parties supposed they had agreed and it turned out there was a misunderstanding as to a material point, the requisite mutual assent as to that point being wanting, it was held that neither was bound."

We think we have fully shown that the answer stated a good defense, and that the Circuit Court erred in sustaining the demurrer thereto.

III.

THIRD ASSIGNMENT OF ERROR.

This assignment of error alleges, that the finding

and judgment of the Circuit Court are erroneous and contrary to law. (*ante* p. 13.)

It is not necessary to say much upon this point, for if the Circuit Court erred in overruling the demurrer to the declaration, or in sustaining it to the answer, it necessarily follows, that its judgment is erroneous and contrary to law, and should be reversed. We think it erred in both instances, for reasons already stated.

It seems to us, considering all the facts of this case, and the law applicable to them, that one of two propositions is established: 1, That said contract of renewal was and is valid and binding in its entirety, and upon all persons in any way interested in said policy; or, 2, that there was and is no contract of renewal at all and said policy ceased to exist on said 16th day of February, 1885. In either case, the judgment of the Circuit Court is erroneous.

To uphold the judgment of the Circuit Court, this Court must make an *entirely new contract* for the parties, and one which Mrs. Adams never made, and to which the company *never assented, and just the reverse of that to which it did assent.*

This we most respectfully submit, is outside of and beyond any legitimate exercise of judicial power.

Upon a similar point, in *Mutual Life Ins. Co.* v. *Young*, 23 Wall., 85, at page 107, this Court said: "He was certainly in nowise bound until such assent was given. Until then, there could be no contract on his part, and if there was none on his part, there could be none on the part of the company. The obligation in such cases is correlative. It there is none on one side there is none on the other.

The requisite assent must be the work of the parties themselves. THE LAW CANNOT SUPPLY IT FOR THEM. *That is a function wholly beyond the sphere of judicial authority.*"

In whatever light the case at bar is viewed, we think it manifest, that the Circuit Court erred, and that the judgment should be reversed.

Respectfully submitted,

JOHN L. MCMASTER,

AUGUSTIN BOICE,

Of Counsel for Plaintiff in Error.

Supreme Court U. S.
FILED
APR 3 1890

Supreme Court of the United States.

OCTOBER TERM 1889.

No. 287.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in Error,

vs.

ELIZABETH R. ADAMS.

BRIEF FOR DEFENDANT IN ERROR.

W. H. H. MILLER,
Attorney for Defendant in Error.

McGill & Wallace, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1889.

THE MICHIGAN MUTUAL LIFE INSURANCE COMPANY, Plaintiff in error,

vs.

ELIZABETH R. ADAMS.

No. 287.

Brief for Defendant in Error.

This was an action at law, in the Circuit Court for Indiana, upon a policy of life insurance, for ten thousand dollars on the life plan, issued by the defendant to the plaintiff upon the life of her husband, Kneeland T. Adams, dated February 16, 1877. The first premium was three hundred and thirty-nine dollars and seventy cents ($339.70), which was duly paid. The succeeding premiums were paid, so that there is no question about any of them until the 16th day of February, 1885. The premium maturing on that day was two hundred and fifty-nine dollars and ten cents ($259.10). On that day Kneeland T. Adams paid of that premium fifty-nine dollars and ten cents ($59.10) in cash and gave his note for the balance, two hundred dollars ($200.00), payable four months after date, to the order of the defendant, and

thereupon defendant delivered to Kneeland T. Adams a receipt in these words:

"*The Michigan Mutual Life Insurance Company.*

"$259.10. DETROIT, MICHIGAN, *February* 16, 1885.

"Received two hundred and fifty-nine and 10-100 dollars, being the annual premium due this day on policy No. 12,711, continuing the same in force until 12 o'clock noon of the 16th day of February, 1886, on the life of Kneeland T. Adams, of Indianapolis, Indiana: *Provided*, That if any note or other obligation has been given for such premium or any part thereof, and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment, the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same.

"O. R. LOOKER,
"*Secretary.*

"(On margin): Renewable term policy.
"(Written across the face in red ink): Countersigned this 16th day of February, 1885.

"A. BOICE,
"*Collector.*

"This receipt must be countersigned across the face by the agent or collector."

The note was placed by the defendant in the hands of its agent at Indianapolis for collection, and on the 7th day of October, 1885, nearly four months after the maturity of the note, Kneeland T. Adams paid to the defendant $110 cash, and received a credit upon said note for that amount, the defendant's collector still retaining the note awaiting the payment of the balance thereof. On the 17th day of December, 1885, Kneeland T. Adams died, and on the 18th of December, defendant's agent surrendered the note to the secretary of the company,

and the company took said note and still holds the same, never offering to return the same to the plaintiff, or to the representatives of said Kneeland T. Adams.

The policy of insurance which is set out as an exhibit to the complaint contains this provision:

"2. If the several premiums in renewal of this policy shall not be paid on or before the time when due at the office of the company or to agents who produce receipts signed by the president or secretary, then and in every such case the company shall not be liable for the payment of the sum insured or any part thereof, and this policy shall cease and determine."

The promise of payment, being the first dozen lines of the first paragraph of the policy, is in the following words:

"The Michigan Mutual Life Insurance Company, Detroit, in consideration of the representations and agreements made to and with it in the application for this policy, and for the sum of three hundred and thirty-nine dollars and seventy cents to it paid by Kneeland T. Adams, doth hereby promise and agree to pay to Elizabeth B. Adams the sum of ten thousand dollars at its office, in the city of Detroit (*any unpaid balance of the current year's premium* or any other indebtedness to the company on account of this policy *being first deducted therefrom*), for her sole use, if living, in conformity with the statute, &c., * * * in sixty days after due notice and satisfactory proof of death of the said Kneeland T. Adams," &c.

There is not in the policy any provision with reference to the giving of a note, and of course, no condition based upon a contingency of a failure to pay such note.

By reason of the fact that about ninety dollars of this note was unpaid at the death of Kneeland T. Adams, the company refused to pay, suit was brought, the complaint showing the facts above stated, and the further fact that Kneeland T. Adams, the husband of the plaintiff, attended to all matters pertaining to the procuring of said policy,

and the payment of the premiums thereon, and averring that plaintiff had no knowledge of the giving of said note, or its non-payment, or the taking of said receipt, or its terms, and denying that her husband had any authority to change or modify the contract as embodied in the policy, and averring that she supposed all premiums had been paid, as provided in said policy, until after proofs of death were made and payment demanded. The complaint contains the other formal allegations necessary to make it good.

A demurrer to this complaint was overruled, and an answer filed setting out no new facts of significance, unless it be in the statement that notes were given, and substantially the same receipts delivered to Kneeland T. Adams for premiums due in the years 1880, 1881, 1882, 1883, and 1884. The other averments in the answer are largely of matters of law. To this answer a demurrer was sustained, and defendant refusing to plead further, judgment was rendered for the plaintiff.

We insist the judgment of the Circuit Court was right upon two grounds:

First. Because reading the policy, the note and the receipt together, the company had no right to forfeit the policy, under the facts stated.

Second. Because, if the receipt would cause a forfeiture, the plaintiff is not bound by the terms of the receipt, and independently of the receipt there is no reasonable question of the right of recovery.

I.

1. Defendant's first contention is that the contract is with Kneeland T. Adams, and not with the plaintiff. This will not do. The promise is to pay to the plaintiff. Under such a contract it is not in the power of the insurance company and the husband, without the consent of

the beneficiary, to change the contract. The right of action is in the beneficiary.

Connecticut Mutual Life Insurance Company *v.* Luchs, 108 United States, p. 498.

Ætna Life Insurance Company *v.* France, 94 United States, 561.

Were the rule otherwise, the husband and the insurance company might make a contract for the assignment or surrender or abrogation of the policy, but it has been repeatedly held that this cannot be done.

Harley *v.* Heist, 86 Ind., 196.

Pence *v.* Makepeace, 65 Ind., 345.

Stilwell *v.* Mutual, etc., 72 New York, 385.

Ricker *v.* Charter Oak, etc., 27 Minn., 193.

Chapin *v.* Fellows, 36 Conn., 132.

Keller *v.* Gaylor, 40 Conn., 343.

2. It is next asserted that the policy is on the "renewable term plan, without participation in the profits," and that there is absolute insurance for a year, with the right at the end of the year to renew at a sum constantly increasing with the age of the insured. It is stated that in such policy there is no reserve, and no right at the expiration of the year save that of renewal. In other words the effort is made to produce the impression that this policy was worth nothing, and that the right of renewal was not a valuable right. As matter of law this proposition was refuted in this Court long ago.

New York Life Insurance Company *v.* Statham *et al.*, 93 U. S., 24.

Klein *v.* Insurance Company, 104 U. S., 88.

As matter of fact and arithmetic, it is refuted by the figures set forth in the complaint and answer. The first premium, when the policy was written, and when Mr.

Adams was forty-seven years old, was three hundred and thirty-nine dollars and seventy cents; the last premium, when he was eight years older, was two hundred and fifty-nine dollars and ten cents. Now, inasmuch as the defendant alleges what every one knows to be true, that the rate of insurance increases with the age of the insured, it is clear that this right of renewal was a valuable right, and one which defendant ought not to be permitted to forfeit, unless the law and facts require it.

3. In support of such claim of forfeiture, defendant relied upon the provision of the receipt, given to Kneeland T. Adams when he gave the note of February 16, 1885, in these words:

"That if any note or other obligation has been given for such premium, or any part thereof, and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment the company shall not be liable, but the whole amount of the premium included in such note or other obligation shall be considered as earned, and the company may collect the same."

Mark, there is not a word with reference to a note, or justifying any such condition, in the policy. The policy itself provides that upon failure to pay the premium the policy shall cease and determine; but it also provides that "*any unpaid balance of the current year's premium*," or any other indebtedness to the company, on account of the policy, in case of death, shall be deducted from the face of the policy. Evidently these two provisions in the policy taken together contemplate the contingency that the company may grant credit for the whole or a part of the premium, and in that case there is to be no forfeiture. The provision in reference to the determination of the policy, in case of non-payment of premium, is confined in its language to a total failure to pay the premium; it says nothing about forfeiture in case of failure to pay

part of the premium, whereas this provision for deduction, in case of loss, is that any unpaid balance of the current year's premium is to be deducted. It seems to me to be clear, therefore, that taking these two provisions of the policy together, they contemplate that, if a part of the premium is accepted, the company thereby gives a credit for the balance of the premium, reserving as its security the right to deduct such unpaid balance from the full payment in case of loss. Certainly this provision in reference to making this deduction means nothing, unless it contemplates the giving of a credit in case of failure of full payment. Having given such credit, it seems clear that the company cannot enforce a forfeiture after the death of the insured, in a case where it has not evinced a purpose to enforce the same during his life. In this case not only was no such purpose evinced, but the note was taken, a partial payment received, credited upon the note, and the note actually held in the hands of the agent of company seeking its collection until after the death of the insured.

Even if the receipt containing the provision upon which the company relies were held to be binding upon the plaintiff, still it would not be a defence in this case, for evidently the stipulation for non-liability, for non-payment of the note "when due" is not more effectual than would be a statement that a policy should become null and void, and in such case it is clear that this defence could not be maintained. Such stipulation is put in for the benefit of the insurer, and if the insurer does not see fit to insist upon the failure to pay, but waives such non-payment and receives partial payments on the note, it would seem that the policy would still be collectible; and such has been held to be the rule by the Supreme Court of Ohio, in a case substantially like this.

Mutual Life Insurance Company *v.* French, 30 Ohio State, 240.

In the brief for the plaintiff in error, it is stated that this Court refused to follow this case in Thompson *against* The Insurance Company (104 United States, 252). On the contrary, this Court, on page 257, speaking of that decision of the Supreme Court of Ohio, says:

"We think that the decision in that case was entirely correct."

This Court held that the Ohio case was not applicable to the Thompson case, because in the Ohio case, as in the case at bar, there was no provision in the policy for a forfeiture in case of the non-payment of a *note* given for a premium, whereas, in the Thompson case there was such provision. In short, as applied to such a case as the case at bar, where the provision for the forfeiture is only in the receipt, and not in the policy, this Court held that the Ohio case was well decided.

In failing to note the distinction between a condition in the policy and one only in the note or receipt to which the wife is not a party, is the fallacy of a large part of the argument for plaintiff in error.

On page 5 of the brief of Mr. Kent, and on pages 17 and 18 of the brief of Messrs. McMaster and Boice for plaintiff in error, counsel for plaintiff in error cite a large number of cases, in which they say:

"It is settled by a unanimous current of decisions that where losses occur, when notes given under such contract are due and unpaid, there is no liability therefor."

An examination of these cases will show that in each of them, except the case in 81 Indiana, the policy expressly provided that a failure to pay a note given for the premium should annul the contract; and in the 81 Indiana case no such question as is here under consideration was involved at all. I think, also, that in each of the cases cited by appellant, most of them being upon fire

policies, the action was by the party who gave the note, and who could, of course, as well agree to a condition in a note as to a condition in the original policy.

Right in that connection, I call the attention of the Court to the fact that the condition in this receipt, upon which plaintiff in error relies, is:

"That if any note or other obligation has been given for such premium, or any part thereof, and the same or any renewal shall not be fully paid when due, then for any loss occurring during such non-payment, the company shall not be liable."

Such conditions, of course, must be strictly construed. The law no more favors a forfeiture of an insurance policy than a forfeiture of a lease. In either case, the facts to justify a forfeiture must meet the exact language of the condition.

Moreover, a condition in a lease once waived, or to use the old common law expression, "once vented," is gone forever.

Dumpor's Case, Cro. Elisz., 815.
1 Smith's Leading Cases, p. 93, &c:
Dakin *v.* Williams, 17 Wend., 448.
Taylor, Landlord & Tenant, secs. 286 and 410.

If there is any reason why the same rule should not apply to an insurance contract, at least so far as the condition applies to the same premium, it is not apparent.

A landlord having a right to forfeit a lease for non-payment of rent to-day, cannot to-morrow receive a partial payment on that rent, and still go right forward and forfeit the lease.

Upon what principle is or should be the rule different as applied to an insurance company?

The condition in this receipt has relation solely to the time when the note becomes due. If not paid then, the condition is broken; but will it be contended that after

such breach of condition the company, by accepting payment of part of the note, does not waive the condition? The condition relates to the non-payment of the entire note, to its non-payment when due; and if the company sees fit to receive a partial payment of the note, after it so becomes due, then the condition is no longer in force, for the condition provided for in the receipt has been waived—that is, full payment at maturity was waived, and the entire note, to which only the condition applied, is not unpaid.

But it is argued that this same course had been pursued at each renewal since 1880, and, therefore, the defendant ought to be discharged. In other words, the proposition is this: That for six years prior to the death of Mr. Adams, this company, according to the theory of the plaintiff in error, was tolling him along, inducing him, by giving notes, some of which during a large part, if not the whole, of said time, were due and unpaid, and paying them as he could from time to time, was getting the entire premium paid, and yet during nearly all of said time was never liable, in case of his death, for the payment of a cent. That is the logical result of their argument. It is fair to presume that payments were made upon the other notes as upon this. In this instance, on the 16th of February, 1885, a note at four months for two hundred dollars was executed, and, of course, became due about the 16th of June. On the 7th of October Mr. Adams paid one hundred and ten dollars on that note, yet he had no insurance after the 16th of June, nor did he get any by that payment, if the theory of plaintiff in error is correct, but was still liable, and his estate is still liable for the payment of the balance. If the entire note, except five dollars, had been paid, still the legal effect would have been the same; plaintiff would have no insurance. I am not prepared to believe that there is any law for such a practice as that.

Counsel for plaintiff in error rest largely upon the case of Baker *against* The Union Mutual Life Insurance Company (43 New York, 283); but all that is decided in that case is, that the husband being the agent of the plaintiff in taking out the policy of life insurance, if she adopt such policy and sue upon it, her claim must be measured by the stipulations in the policy, a proposition which no one questions. The policy in that case especially provided that a failure to pay any note given for the premium should make the policy void.

The counsel for plaintiff in error seem determined to ignore the fact that, whereas in all the cases they cite, the policy itself contains the condition that a non-payment of the note shall work a forfeiture; in the case at bar there is nothing of the kind in the policy. They refuse to see the fact that in the cases they cited where the condition is in the policy, the wife gets no rights except under that condition; whereas, in the case at bar, she has rights under the policy which they seek to destroy, by an agreement of her husband which she never authorized, and of which she had no knowledge.

II.

So far, this question has been argued as if Mrs. Adams were bound by the action of her husband in taking the receipt in question; but I deny utterly that she is so bound. It will be observed that the condition relied upon by plaintiff in error is neither in the policy nor in the note. Undoubtedly, for the reasons just stated, Mrs. Adams is chargeable with knowledge and bound by every stipulation in the policy. This is clear upon principle and upon the decided cases; but when the policy had been taken out in her favor as beneficiary, it was beyond the power of her husband and the company to change the contract, without her consent. As we have seen, the first paragraph of the policy clearly contemplates

that a credit may be given for a part of the premium, and, in case of death, the money be recouped from the face of the policy; but it does not contemplate that, under any circumstances, Kneeland T. Adams and the insurance company shall enter into a further and independent contract by which the terms of the policy shall be changed without the knowledge of the plaintiff; and yet this is exactly what has been done. The condition relied on is not even in the note, but is in a third paper, called a receipt. If such a modification of the contract can be made as is in this receipt, then another beneficiary might be substituted, or the policy might be surrendered upon a consideration moving to some one besides the beneficiaries named therein, and without their consent. Yet this, it has been expressly decided, and counsel for plaintiff in error McMaster & Boice on page 42 of their brief admit, could not be done.

Harley *v.* Heist, 86 Indiana, 196.
Pence *v.* Makepeace, 65 Indiana, 345.
Stilwell *v.* Mutual, etc. Co., 72 New York, 385.
Ricker *v.* Charter Oak, etc. Co., 27 Minn., 193.

In short, as we have already seen, the contract in this policy has a property value. That value was the property of the beneficiary named therein, and without her consent the contract could not be changed.

As shown in the Indiana decisions just cited, the policy was the personal property of the wife, and no more subject to her husband's control, than if he and she were entire strangers. And there is no presumption that the wife had authorized the husband to make any new contract; but if such authorization is relied on, it must be averred and proved.

Pence, Administrator, *v.* Makepeace, 65 Indiana, 364.

But it is said that if her husband had not given the note and receipt, the policy would have lapsed. That does not follow. There is nothing to show that she might not have continued the policy in force, according to its terms, but for this attempted new contract.

However that may be, it is settled, that, in such case, though the husband need not pay the premium, but may let the policy lapse if he will, yet if he does pay the premium, the policy is kept alive and is unchanged as the property of the original beneficiary.

Harley *v.* Heist, 86 Indiana, 202 and 203.

But, it is said that Mrs. Adams did consent, because her husband was her agent, and a very large number of authorities are cited to the proposition that what is done by one's agent is done by himself; and that the principal is chargeable with the knowledge of the agent; and that the principal cannot adopt a part of the agent's act without adopting the whole; and that he cannot ratify a part without ratifying the whole.

All these propositions, as general propositions, are unquestioned, and unquestionable; but there are exceptions to these rules as well established as the rules themselves. In the first place, there is no such thing as ratification of an agent's act without knowledge of that act. (Smith *v.* Tracy, 36 N. Y., 79.)

In the second place, a part of an act of an agent may be within his authority, and another part wholly beyond such authority; and in such case, if the party with whom the agent deals has knowledge, or is chargeable with knowledge, of such lack of authority, then the principal is not bound by the unauthorized act. In the case at bar, Kneeland T. Adams was the agent of the plaintiff, authorized to renew this policy of insurance in accordance with its terms, and not otherwise. What those terms were, the insurance company well knew; and if it

dealt with Kneeland T. Adams outside the terms of that policy, it did so at its own peril. The pleadings show that Mrs. Adams knew nothing of the giving of the receipt; she knew nothing of any act, or attempted act on the part of her husband outside the scope of his authority, or what was warranted by the terms of this policy. On the contrary, the insurance company did know that this receipt attempted to change her rights under the policy; and it was therefore bound, at its peril, to bring that fact to her attention, and inquire whether she was assenting; and this fact not having come to her knowledge at all, until after the death of her husband, when it was too late for her to repudiate his acts and save her rights, the company is responsible; and such are the decisions.

Thus in Bryant *v.* Moore (21 Maine, 84), an agent authorized to make an exchange of a yoke of oxen assumed authority, not incident to that transaction, to make a warranty, and as part of the transaction received a note for his principal, of which such warranty was a part of the consideration. One of the oxen so warranted proved to be worthless, and in a suit upon the note by the principal an attempt was made to set up the warranty, but it was held that the maker of the note had no right to accept or rely upon the warranty, it not being incident to the power to make the exchange, and that the principal might adopt the act of his agent in making the trade and taking the note, and repudiate the warranty.

So, in Smith *v.* Tracy (36 New York, 79), which was a sale of bank stock through an agent who without authority gave a warranty. Upon the same principle it was held that the principal might affirm the sale and hold the proceeds, and was not bound by the warranty.

So, in Condit *v.* Baldwin (21 New York, 219), an agent, intrusted with money to loan, exacted a bonus for himself in excess of legal interest as a condition to making the loan. In support of a plea of usury the

same principle relied on here was invoked, namely, that the principal by adopting the loan, adopted all the acts of his agent in making the loan; and the loan being usurious, his security failed; but it was held that his security was good and could be enforced; that he might affirm in so far as the act of his agent was authorized, and repudiate the balance. In a dissenting opinion Judge Comstock, on page 231, takes the position that the plaintiff could not in that case ratify a part without ratifying the whole contract.

The same principle announced in Condit *v.* Baldwin, is affirmed in Bell *v.* Day (32 New York, 165), upon similar facts.

There can be no pretence that Mrs. Adams has in this case, either through her husband or otherwise, committed a fraud upon the defendant, so as to bring the case within the rule in Bennett *v.* Judson (21 New York, 238).

In Smith *v.* Tracy (36 New York, 79), the following language is used:

"In the case before us, it is claimed that the receipt by the testator of the proceeds of the authorized sale is to be deemed an adoption of the contract made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys, and others, clothed with limited powers, and occupying strictly fiduciary relations."

Owings *v.* Hull, 9 Peters, 608, 629.
Bell *v.* Cunningham, 3 Peters, 69, 76, 81.
Brady *v.* Todd, 99 Eng. Com. Law, 591, 601, 605.
Freeman *v.* Rosher, 66 Eng. Com. Law, 797.
Seymour *v.* Wyckoff, 10 N. Y., 213.

"In the language of Judge Story, in the first of these cases, no doctrine is better settled than this, that the ratification of the act of the agent, previously unauthorized, must, in order to bind the principal, be with full

knowledge of all the material facts. The plaintiff is chargeable with notice of the extent and limits of the power of the special agent from whom he purchased."

So, we say here that the insurance company was chargeable with notice that the beneficial interest in this policy was in Mrs. Adams, and that unless he had express authority so to do, her husband had no power to change the contract.

In Baxter, administratrix, *against* Buck (10 Vermont, 548) it is held, where an agent authorized to settle a debt due an estate, takes a note to the administrator for a principal sum due, and one to himself for usurious interest, the first note is not void, unless the administrator knew of the usury and assented to it.

So, in Cooley *v.* Perrine (41 New Jersey Law, 322), it is held, first, that the special agent, authorized to sell a horse, is not thereby authorized to warrant the quality on behalf of his principal; second, an action to recover the price of a horse, sold by a special agent, brought after it has ceased to be practicable to avoid the sale, and restore the vendor and vendee to their original position, namely, after the horse has died, in the possession of the vendee, does not constitute a ratification of the unauthorized warranty of quality made by such agent. In this case, on page 331, it is said:

"What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract; and if, when he acquires knowledge, he cannot in justice to himself disavow the whole of his agent's contract, he is entitled to stand upon what he authorized, and repudiate the rest. The purchaser who deals with a special agent without knowing the bounds of his power must suffer, rather than an innocent principal."

In the case at bar the insurance company knew—was

bound to know—that plaintiff's husband, as her agent, could only act within the limits of the policy; that he could not add to or subtract from her rights as named by that policy.

On the other hand, Mrs. Adams did not know, and was not chargeable with, knowledge that he was exceeding, or attempting to exceed, his authority. She was not, therefore, bound by his unauthorized acts.

But counsel say these are decisions on sales of personal property, and do not apply to such a case as this. Why? The principle is the same. The question is one of agency, not of insurance or sales.

But the same rule does obtain, and prevailed in the very insurance cases above cited. Harley *v.* Heist, Pence *v.* Makepeace, and all of that class where the policy is surrendered or assigned by the husband without the wife's consent, and where the premiums are paid upon a new contract and often by a new party, are good illustrations. In such cases she is permitted to adopt and take the benefit of the payments and repudiate what is to her disadvantage.

In conclusion, then, I say the judgment is right, because—

First. Construing the policy, note, and receipt together, the company, having received a partial payment on the note long after maturity, and continuing to hold the note and trying to collect the balance up to the very death of Mr. Adams, has waived any claim of forfeiture; and,

Second. The receipt being in the nature of a new contract outside the policy, made without Mrs. Adams' knowledge, she is not bound thereby; and, eliminating the receipt, the waiver of the claim of a forfeiture is still more clear.

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